No. _____

Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

OFFICE OF THE CLERK

October Term, 1998

BOUCHARD TRANSPORTATION COMPANY, INC.;
TSACABA SHIPPING COMPANY, INC.;
MARITRANS OPERATING PARTNERS L.P., *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether district courts exercising their admiralty and maritime jurisdiction should apply the procedure of Supplemental Rule F to implement the limitation of liability provisions of the Oil Pollution Act of 1990 (OPA 90).

2. If not, whether this Court will make the rules needed to fill the resulting procedural void as it did in a similar situation in *Norwich Co. v. Wright*, 80 U.S. (13 Wall.) 104, 125 (1871).

INTERESTED PARTIES

In the district court the owners of vessels involved in a maritime accident commenced three limitation of liability cases under Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims. The cases were consolidated in the district court and on appeal to the circuit court. The vessel owners, limitation plaintiffs in the consolidated cases and joint petitioners here, are as follows:

BOUCHARD TRANSPORTATION COMPANY, INC.; TUG CAPTAIN FRED BOUCHARD INC.; and B NO. 155 CORPORATION. These petitioners have no parent or subsidiary companies.

MARITRANS OPERATING PARTNERS L.P. and MARITRANS GENERAL PARTNER INC. The parent company of these petitioners is MARITRANS INC. There are no subsidiary companies.

TSACABA SHIPPING COMPANY, INC.; HIONG GUAN NAVEGACION CO., LTD.; and DOWA LINE AMERICA CO., LTD. The parent company of HIONG GUAN NAVEGACION CO., LTD. and DOWA LINE AMERICA CO., LTD. is DOWA LINE CO., LTD. There are no subsidiary companies.

INTERESTED PARTIES – Continued

Those appearing in the three limitation cases as claimants, respondents here, are as follows:

Amora, Pepito G.
Anaya, Evangelisto
Ancar, Marshall
Bleckley Corp. d/b/a Etchings Lounge
Boca Ciega Hotel, Inc.
Charmar of Pinellas County, Inc., d/b/a Saxony Apartments Motel
Continental Insurance Company
Excel Hotels, Inc.
Florida Department of Environmental Protection
Garnett, Mary A.
Geiken, Mary Beth
H & H Package Store d/b/a Pappy's Package Store
Hopkins, Robert
Jones, Barry and Brenda Jones d/b/a All Suites Motel
Jones, John
Koukoulis, Yiannis
McCorkle, John Paul
Panagokas, Michael
Passamano, Russel J. as Trustee of SS MISS BELMAR, INC.
Rush, Edward P.
Salamanca, Jose A.
Scholeer, Harry
Shihadeh, Ahmad
Tobin, Don
Tobin, Joan
Updegraff, Ambrose G.
Updegraff, Ramona M.
United States of America

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1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 3-1 at 55 (Practitioner Treatise Series, 2d. ed. 1994) 18

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PETITION FOR WRIT OF CERTIORARI

BOUCHARD TRANSPORTATION COMPANY, INC.; TUG CAPTAIN FRED BOUCHARD INC.; B NO. 155 CORPORATION; MARITRANS OPERATING PARTNERS L.P.; MARITRANS GENERAL PARTNER INC.; TSACABA SHIPPING COMPANY, INC.; HIONG GUAN NAVEGACION CO., LTD.; and DOWA LINE AMERICA CO., LTD. respectfully pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Eleventh Circuit entered on July 31, 1998.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit entered July 31, 1998, is reported at 147 F.3d 1344 and reproduced in the Appendix at 1. The order of the United States District Court for the Middle District of Florida of October 22, 1996, is unreported and reproduced in the Appendix at 21.

JURISDICTION IN THIS COURT

Petitioners seek review of an opinion entered on July 31, 1998, by the United States Court of Appeals for the Eleventh Circuit. The Supreme Court has jurisdiction to review cases from the Circuit Courts of Appeals under 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISION

Article III, Section 2, of the United States Constitution provides in relevant part that "[t]he judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction. . . . "

RULE INVOLVED

Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims, Federal Rules of Civil Procedure, 28 U.S.C., is reproduced in its entirety in the Appendix at 33. Rule F(1) reads in relevant part as follows:

> **(1) Time for Filing Complaint; Security.** Not later than six months after receipt of a claim in writing, any vessel owner may file a complaint in the appropriate district court, as provided in subdivision (9) of this rule, for limitation of liability pursuant to statute.

STATUTES INVOLVED

The Oil Pollution Act of 1990, 33 U.S.C.A. § § 2701 *et seq.* (West Supp. 1998) (OPA 90),[1] provides in relevant part as follows:

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[1] All citations to OPA 90 are to 33 U.S.C.A. (West Supp. 1998).

§ 2704. Limits on liability

(a) General rule

Except as otherwise provided in this section, the total of the liability of a responsible party under section 2702 of this title and any removal costs incurred by, or on behalf of, the responsible party, with respect to each incident shall not exceed –

(1) for a tank vessel (except a tank vessel on which the only oil carried as cargo is an animal fat or vegetable oil, as those terms are used in section 2720 of this title) the greater of –

(A) $1,200 per gross ton; or

(B)(i) in the case of a vessel greater than 3,000 gross tons, $10,000,000; or

(ii) in the case of a vessel of 3,000 gross tons or less, $2,000,000;

(2) for any other vessel, $600 per gross ton or $500,000, whichever is greater. . . .

The Limitation of Shipowners' Liability Act of 1851, 46 U.S.C. § 181-189 (1851 Limitation Act), provides in relevant part as follows:

§ 183. Amount of liability; loss of life or bodily injury; privity imputed to owner; "seagoing vessel"

(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or

> thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

STATEMENT OF THE CASE

Basis For Federal Jurisdiction In The District Court

Jurisdiction in the district court was under 28 U.S.C. § 1333 (admiralty and maritime jurisdiction), 28 U.S.C. § 1331 (federal question jurisdiction), and 28 U.S.C. § 1367 (supplemental jurisdiction).

Material Facts and Procedural History

During the dark, early morning hours of August 10, 1993, a bulk freighter, carrying a cargo of phosphate product, was outbound in Tampa Bay heading for the Gulf of Mexico. Inbound, two tugs pushed tank barges loaded with petroleum products. There were collisions between the bulk freighter and both tank barges.

One of the tank barges carried a cargo of light petroleum products such as gasoline and jet fuel. Its cargo exploded and burned, and the officers and crew abandoned ship. The collision tore the other tank barge open, and heavy number 6 oil spilled into the waters of Tampa Bay. As a result of tides and winds, the number 6 oil floated out of the bay into the Gulf of Mexico and ultimately came ashore in the tidal waters and on the beaches of Pinellas County, Florida.

Following the incident, the vessel owners, joint petitioners here, commenced admiralty limitation of liability proceedings under Supplemental Rule F in the United States District Court for the Middle District of Florida.

In the limitation cases, the vessel owners sought exoneration from liability. In the alternative, all of the vessel owners sought limitation of liability under the 1851 Limitation Act as to claims subject to limitation under the 1851 Limitation Act. Further, the owners of the petroleum-carrying tank barges, which had been designated "responsible parties,"[2] sought limitation of liability under OPA 90 as to claims subject to limitation under OPA 90. The 1851 Limitation Act provides for limitation of liability based on the value of a vessel, and OPA 90 provides for limitation based on the size of a vessel.

Injunctions and monitions were issued in each case pursuant to Supplemental Rules F(3) and F(4) (Appendix 25, 28), barring prosecution of claims against the vessel owners and their vessels outside of their respective limitation case and setting a deadline for claimants to appear and file their claims. The limitation cases were consolidated. This established in the district court a *concursus* of all claims arising out of the incident.

The injunctions and monitions in the limitation cases of the tank barge owners were tailored to implement the

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[2] "Responsible party" is a term used in OPA 90 to designate the owner, operator, or demise charterer of a vessel from which oil is spilled. 33 U.S.C.A. § 2701(32)(A). "Responsible party" does not necessarily equate to "at fault party" because a "responsible party" may assert absolute defenses to liability under 33 U.S.C.A. § 2703.

claims presentation procedure of OPA 90 section 2713(a) and instructed those with claims under OPA 90 to present their claims in the first instance directly to the vessel owners' representative. (Appendix 26, 34). *See generally Boca Ciega Hotel, Inc. v. Bouchard Transp. Co., Inc.*, 51 F.3d 235 (11th Cir. 1995) (enforcing the claims presentation procedure).

Numerous claimants appeared in the limitation cases and filed claims under Supplemental Rule F(5). (Appendix 35). The claims sought recovery under the general maritime law, OPA 90 and other federal environmental protection statutes, and under Florida common law and statutory law.

Claimants sought recovery of an assortment of damages. Federal and state trustees sought recovery for damage to the environment, private parties sought recovery for property damage and for economic losses arising out of the spill, the crew of one of the tugs sought recovery for personal injuries, and the vessel owners sought recovery among themselves for collision damage and damage to and loss of cargo.

Some claimants moved the district court to dismiss the limitation cases so that claimants could bring claims under OPA 90 and under Florida law outside of the limitation cases (outside of the *concursus)* in any state court or federal court having jurisdiction over the parties and their claims.

On October 22, 1996, the district court entered an order granting the motions to dismiss, ruling that Supplemental Rule F applied only to claims subject to limitation under the 1851 Limitation Act and did not apply to claims

subject to limitation under OPA 90. (Appendix 22). Thus, the injunctions creating the *concursus* were to be dissolved as to claims under OPA 90. The order did not affect claims to the extent they were based on the general maritime law and on Florida common law, which are subject to limitation under the 1851 Limitation Act, so these aspects of the limitation cases would go forward in any event.

The district court, in footnote one, stayed the effect of its order, pending the resolution of appeals, and said:

> The vessel owners raise significant and legitimate concerns regarding prejudice, inconsistent rulings, judicial economy, splitting of claims, unnecessary expenditure of resources, and the like. I concede that I experience a degree of uneasiness with the effect of today's ruling. As I announced at the conclusion of oral argument, this is one of those instances when the result that makes the most sense (and the result that perhaps ought to be pursued) is either inconsistent with or not permitted by a combination of the prevailing law and the parties. Perhaps the Eleventh Circuit will disagree with my view or the legislative and judicial bodies responsible for promulgating the governing statutes and rules will provide some clarity and guidance. Both the effect of this order and these limitation actions (as they pertain to the moving claimants) are STAYED pending the resolution of any appeals.

(Appendix 23-24).

The vessel owners appealed to the United States Court of Appeals for the Eleventh Circuit from the order

of October 22, 1996. On July 31, 1998, the Eleventh Circuit affirmed the district court's order to the extent of the ruling that claims under OPA 90 were not subject to the *concursus* procedure of Supplemental Rule F. (Appendix 1).

This petition seeks review of the Eleventh Circuit's decision.[3]

REASONS FOR GRANTING THE PETITION

I.

VESSEL OWNERS HAVE BEEN DEPRIVED OF THEIR OPA 90 LIMITATION OF LIABILITY RIGHTS BY THE LOWER COURTS' FAILURE TO APPLY SUPPLEMENTAL RULE F AS THE PROCEDURAL DEVICE TO IMPLEMENT LIMITATION RIGHTS.

One of the fundamental purposes of OPA 90 is to provide a basis for vessel owners to limit liability to some reasonable amount in the event of an oil spill. Indeed, the preamble reads: "**An Act to establish limitations on liability for damages resulting from oil pollution**, to establish a fund for the payment of compensation for such damages, and for other purposes." Act of August 18, 1990, Pub.L.No. 101-380, 1990 U.S.C.C.A.N. (104 Stat.) 484 (emphasis added). Section 2704 of OPA 90 contains the limitation provisions and grants to vessel owners the right to seek limitation of liability as to claims arising out of oil spills to certain amounts based on the size of their

[3] The Eleventh Circuit also addressed an Eleventh Amendment issue not raised in this petition. (Appendix 9-11).

vessels, such as $1,200 per gross ton under section 2704(a)(1)(A).[4]

There being no procedure within OPA 90 to implement the limitation provisions, vessel owners have relied on the procedure of Supplemental Rule F, which provides that vessel owners "may file a complaint in the appropriate district court . . . for limitation of liability **pursuant to statute**." Supplemental Rule F(1) (emphasis added).

In the absence of any other statute, rule, or regulation to implement the limitation of liability provisions of OPA 90, there is every indication that the use of Supplemental Rule F to protect limitation rights under OPA 90 was intended by Congress. The plain language of the Rule supports its use, and there is nothing in the legislative history of OPA 90 that suggests that Supplemental Rule F was not the intended procedural device for implementing the limitation of liability provisions of OPA 90. The entire legislative history of OPA 90 has been reviewed, including hundreds of pages of hearing transcripts, and there is no mention of the proper procedure for a vessel owner to follow to assert OPA 90 limitation rights. Therefore, it is reasonable to assume that Congress intended that the procedural rule already in effect–Supplemental Rule F–would be used to assert the right to limitation under OPA

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[4] "Gross ton" is a measurement of the internal volume of a vessel with 100 cubic feet of space equaling one gross ton. *See* 46 C.F.R. § 69.9 (1997). For example, the gross tonnages of the tank barges involved here are 9,262 and 14,679, so the OPA 90 limits on liability at $1,200 per gross ton would be $11,114,400 and $17,614,800, respectively.

90. Congress should not be presumed to have been ignorant of this process and its efficacy. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (Congress is presumed to be aware of existing law).

Notwithstanding the clear need for a procedure to implement the limitations on liability in OPA 90, the Eleventh Circuit in this case and the First Circuit in *In re Metlife Capital Corp.*, 132 F.3d 818, *cert. denied sub nom, In re Bunker Group, Inc.*,___ U.S.___, 118 S. Ct. 2367 (1998), denied to vessel owners the use of Supplemental Rule F to seek limitation of liability under OPA 90, restricting use of the rule to the 1851 Limitation Act. The rulings of those courts are tantamount to a denial of vessel owners' right to avail themselves of the limitation of liability provisions of OPA 90. Therefore, if the Eleventh Circuit's decision in this case and the First Circuit's decision in *Metlife* remain the law, vessel owners' limitation rights under OPA 90 will remain illusory, rendering a significant part of OPA 90 meaningless. Vessel owners find themselves left with a right but no procedure to enforce the right.

This Court has observed:

> Unless, therefore, the District Courts themselves can administer the law, we are reduced to the dilemma of inferring that the Legislature has passed a law which is incapable of execution. This is never to be done if it can be avoided.

Norwich Co. v. Wright, 80 U.S. (13 Wall.) 104, 123-124 (1871).

The lower courts have protected well the rights of claimants seeking recovery of damages under OPA 90 but

have completely ignored the rights of vessel owners. OPA 90 represents a balance of the interests of vessel owners and of claimants. OPA 90 provides a scheme for limitation of liability of vessel owners and for claimants to recover fully, if not from vessel owners whose liability might be limited, then from the Oil Spill Liability Trust Fund under OPA 90 section 2712. However, the lower courts have left vessel owners without the procedural ability to limit their liability, destroying the balance. This may well be a result of a belief that polluters' rights (regardless of fault) do not deserve the same respect as victims' rights. This Court recently rejected such reasoning. *See United States v. Bestfoods*, ___ U.S. ___, 118 S. Ct. 1876, 1884-1885 (1998).

II.

TO IMPLEMENT LIMITATION OF LIABILITY RIGHTS, A PROCEDURE MUST EXIST FOR MARSHALING ALL CLAIMS RESULTING FROM AN OIL SPILL INTO ONE CASE, CREATING A *CONCURSUS* OF CLAIMS.

Absent a procedure for marshaling all claims arising out of an oil spill into one case, establishing a *concursus* of claims, vessel owners' limitation rights cannot be protected. Consider the fate of the owner of a 10,000 gross ton tank vessel sued by ten claimants in ten separate lawsuits, in each of which it is ruled that the vessel owner is entitled to limitation of liability to $12,000,000 ($1,200.00 x 10,000 gross tons). There is nothing to prevent each claimant from recovering $12,000,000 so that the vessel owner would end up having to pay

$120,000,000, ten times what Congress intended the vessel owner's maximum liability to be.

Only when claims are marshaled into a single forum may a vessel owner be assured that it will not be required to pay more than its limited liability, provided the right to limit liability is established. Res judicata does not solve the problem, because the plaintiff in each lawsuit would be different. Res judicata applies only if a certain plaintiff commences successive lawsuits. *See Brown v. Felsen*, 442 U.S. 127, 131 (1979) (indicating that res judicata bars further claims by the same parties or their privies); *S.E.L. Maduro (Florida), Inc. v. M/V ANTONIO DE GASTANETA*, 833 F.2d 1477, 1481 (11th Cir. 1987) (noting that res judicata precludes multiple suits between the same parties). Similarly, consolidation of separate actions is not a solution. Without a *concursus*, individual cases may proceed both in federal courts and in state courts under the concurrent jurisdiction provisions of OPA 90 sections 2717(b) and (c). There is no basis upon which to consolidate federal and state proceedings. Only Supplemental Rule F creates the required *concursus* of claims in a single court.

Likewise, vessels will be subjected to multiple arrests or attachments following a pollution incident if this Court does not clarify that Supplemental Rule F applies to OPA 90. Supplemental Rule C allows claimants to proceed against vessels *in rem*. Similarly, Supplemental Rule B, in certain circumstances, allows attachment of vessels (or other property of the vessel owner) as a form of substituted service of process to perfect *in personam* claims. The only real obstacle to successive arrests or attachments of a vessel in different ports by different claimants is Supplemental Rule F(3), under which the district court enjoins

other actions against the vessel owner "or the owner's property with respect to the matter in question. . . ." Without Supplemental Rule F limitation procedure, a vessel involved in a significant pollution incident would in all likelihood be entirely removed from commerce by suffering multiple, sequential arrests or attachments, causing insurmountable problems for the vessel owner (such as with its mortgagees and insurers). As with the example set forth above involving ten claimants with ten separate lawsuits, successive arrests or attachments would result in liability far beyond the maximum liability Congress intended the vessel owner to face.

Furthermore some claimants have claims based variously on general maritime law, OPA 90, and Florida law. Therefore, if there is no *concursus* of claims, some of the claims of those having multiple basis upon which to assert claims will remain in the limitation cases and other of their claims will be brought elsewhere. This runs counter to established policy against the splitting of causes of action. *See Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 320 (1927).

This Court has emphasized the importance of the *concursus*, saying:

> The heart of [the limitation] system is a *concursus* of all claims to ensure the prompt and economical disposition of controversies in which there are often a multitude of claimants.

Maryland Casualty Co. v. Cushing, 347 U.S. 409, 415 (1954) (speaking in reference to the 1851 Limitation Act).

Similarly, maritime law commentators have concluded:

> That a *concursus* is inherent in a limitation proceeding is evidenced by the fact that all limitation regimes, including those that contemplate claims being brought in courts of different countries, provide for a *concursus* of claims. . . . Indeed, it is impossible to imagine how limitation would work, regularly or otherwise, without a *concursus*.

Robert Force & Jonathan M. Gutoff, *Limitation of Liability in Oil Pollution Cases: In Search of Concursus or Procedural Alternatives to Concursus*, 22 Tul. Mar. L.J. 331, 369-370 (1998).

That a *concursus* of claims in a single forum is necessary to give effect to limitation rights of vessel owners was recognized by this Court when the 1851 Limitation Act was first considered. The 1851 Limitation Act, in its original form, was void of any procedure to give it effect, prompting this Court to set forth in its opinion the procedure for vessel owners to follow, which included a *concursus* of claims in a single forum. *Norwich Co. v. Wright*, 80 U.S. (13 Wall.) 104, 125 (1871).

In its present form OPA 90 also includes no procedural device for vessel owners to follow to seek limitation. However, there is a difference between the state of the law in 1871 when *Norwich* was before this Court and the state of the law today. Supplemental Rule F is now in place as a suitable rule for administering any limitation statute, OPA 90 included.

Supplemental Rule F replaced former Admiralty Rules 51-54[5] in 1966 when civil and admiralty procedure were unified. *See* 28 U.S.C.A. Supplemental Rules 1966 advisory committee notes. In each version of the former Admiralty Rules, specific reference was made to the 1851 Limitation Act.[6] However, Supplemental Rule F(1) makes no reference to the Act and broadly provides that a "vessel owner may file a complaint in the appropriate district court . . . for limitation of liability **pursuant to statute**." (emphasis added). The word "statute" has replaced the specific reference in the former Admiralty Rules to the 1851 Limitation Act. A change in unambiguous language of a statute or rule reflects an intent to change its effect. *See Argosy, Ltd. v. Hennigan*, 404 F.2d 14 (5th Cir. 1968); *Watkins v. Bessemer State Technical College*, 782 F. Supp. 581 (N.D. Ala. 1992). *See also* Norman J. Singer, *Statutes & Statutory Construction* § 22.30 (5th ed. 1993). Therefore, this change in language shows an intent to expand the application of Supplemental Rule F beyond the 1851 Limitation Act, and this plain language should be given effect. *See Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 540-541 (1991); *Garcia v. United States*, 469 U.S. 70, 75 (1984).

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[5] Admiralty Rules 51-54, as rescinded and replaced in 1966, are reported at 334 U.S. 864; 68 S. Ct. CLXII (1948). The rules are also reproduced at 5 *Benedict on Admiralty* at 91-96 (7th ed. 1997).

[6] Admiralty Rules 51-54 were originally Rules 54 through 57, 80 U.S. (13 Wall.) xi, xii-xiv (1872).

III.

IF SUPPLEMENTAL RULE F DOES NOT APPLY, THIS COURT SHOULD PROVIDE A RULE PURSUANT TO ITS AUTHORITY AS THE FINAL ARBITER OF ADMIRALTY AND MARITIME LAW.

In *Norwich* this Court recognized that the 1851 Limitation Act did not establish a procedure for vessel owners to follow to seek limitation under the Act. Whereupon this Court said: "[T]his court, undoubtedly, has the power to make all needful rules and regulations for facilitating the course of proceeding." *Norwich*, 80 U.S. (13 Wall.) at 124. Accordingly, this Court set forth in its opinion the procedure for vessel owners to follow, and Rules 54-57 were added to the Rules of Practice for the Courts of the United States in Admiralty and Maritime Jurisdiction to preserve the procedure for other cases. *See* 80 U.S. (13 Wall.) xi, xii-xiv (1872).

This Court continues to have rule-making authority. 28 U.S.C.A. section 2072 provides:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and the courts of appeals.

The only limitation on this authority is the requirement under 28 U.S.C.A. section 2074(a) that the Court transmit proposed rules to Congress "not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective," and the "rule shall take effect no earlier than December 1 of the year in which

such rule is so transmitted unless otherwise provided by law."

In 1988, the procedure for enacting rules was substantially revised by the Judicial Improvements and Access to Justice Act of 1988, Pub.L.No. 100-702, 102 Stat. 4642. An early version of the Bill provided that the Judicial Conference would promulgate procedural rules instead of the Supreme Court. This suggestion was rejected, and the Supreme Court retained promulgating authority. *See* H.R. Rep. No. 99-422, at 20 (1985); *see also* H.R. Rep. 100-889, at 26 (1988), reprinted in 7 U.S.C.C.A.N. 5982, 5986 (adopting and applying H.R. Rep. No. 99-422 to the Access to Justice Act of 1988). H.R. Rep. 99-422 at 20 reads: "[U]nder the bill the Supreme Court continues its role as the promulgating authority."

This Court's rulemaking authority is not limited by 28 U.S.C.A. section 2073, which establishes a procedure for the Judicial Conference to assist in the prescription of rules. While it is often the case that rules are developed by the Judicial Conference for ultimate adoption by this Court, this Court retains independent authority to promulgate procedural rules. Furthermore, section 2073(e) provides that the "[f]ailure to comply with this section [2073] does not invalidate a rule prescribed under section 2072 or 2075 of this title." Thus, a procedural rule need not originate in the Judicial Conference to be effective, but rather, a rule can be prescribed directly by the Supreme Court in accordance with its powers under section 2072.

Moreover, when this Court acts in matters maritime, it is acting pursuant to a direct grant of authority under

the United States Constitution. Article III, section 2 of the United States Constitution provides: "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction. . . . " This is the only instance in the Constitution of a delegation of jurisdiction over an entire subject to the federal judiciary. *See* 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 3-1 at 55 (Practitioner Treatise Series, 2d ed. 1994). Therefore, this Court, as the final arbiter of admiralty and maritime law, must have the authority to make the needful rules and the Constitutional duty to do so.

CONCLUSION

The Court should grant this petition.

Respectfully submitted,

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 96-3494

D. C. Docket No. 94-233-CIV-T-23

BOUCHARD TRANSPORTATION COMPANY, INC., for exoneration from or limitation of liability as owner or as owner pro hoc vice of Tug Capt. Fred Bouchard and Barge B. No. 155, TUG CAPTAIN FRED BOUCHARD CORPORATION, for exoneration from or limitation of liability as owner or as owner pro hac vice of Tug Capt. Fred Bouchard and Barge B. No. 155, et al.,

Plaintiffs-Appellants,

versus

RAMONA M. UPDEGRAFF, AMBROSE G. UPDEGRAFF, et al.,

Claimants-Appellees,

BOCA CIEGA HOTEL, INC., et al.,

Movants-Appellees.

No. 96-3605

D. C. Docket No. 93-1399-CIV-T-23A

TSACABA SHIPPING COMPANY LIMITED, as owner of the M/V Balsa 37, Official Number 228571, HIONG GUAN NAVEGACION CO., LTD., as charterer of the M/V Balsa 37, Official Number 228571, et al.,

Plaintiffs-Appellants,

versus

ENVIRONMENTAL PROTECTION AGENCY, State of Florida, UNITED STATES OF AMERICA, et al.,

Claimants-Appellees,

BOCA CIEGA HOTEL, INC.,

Movant-Appellee.

No. 96-3727

D. C. Docket No. 94-227-CIV-T-21B

MARITRANS OPERATING PARTNERS L.P., for exoneration from or limitation of liability as owner of the tug Seafarer, official number 532672, and Barge Ocean 255, official number 534910, MARITRANS GENERAL PARTNER, INC., for exoneration

from or limitation of liability as owner of the tug Seafarer, official number 532672, and Barge Ocean 255, official number 534910,

Plaintiffs-Appellants,

versus

RAMONA M. UPDEGRAFF, AMBROSE G. UPDEGRAFF, et al.,

Claimants-Appellees,

BOCA CIEGA HOTEL, INC., et al.,

Movants-Appellees.

Appeals from the United States District Court for the Middle District of Florida

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(July 31, 1998)

Before COX, DUBINA and BLACK, Circuit Judges.

BLACK, Circuit Judge:

This appeal presents three issues: (1) whether the State of Florida, Department of Environmental Protection (Florida), is entitled to Eleventh Amendment sovereign immunity from a maritime limitation proceeding initiated pursuant to Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims (Rule F); (2) whether claims brought pursuant to the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-2761 (OPA 90), are subject to Rule F and therefore constrained to Rule F limitation proceedings; and (3) whether claims brought pursuant to Florida's Pollution Discharge Prevention and Control Act, Fla. Stat. ch. 376.011-.17, 376.19-.21 (Florida Act), are subject to

Rule F and therefore constrained to Rule F limitation proceedings.

I. BACKGROUND

A freighter and two tugs pushing petroleum-carrying barges collided in Tampa Bay on August 10, 1993. Within six months of the collision, the owners of the three vessels (Owners) each filed a complaint in the district court for exoneration from or limitation of liability in accordance with Rule F.

A. *Statutory Framework*

Rule F evolved as a procedural device to implement the Limitation of Shipowner's Liability Act of 1851, 46 U.S.C. app. §§ 181-196 (Limitation Act). The Limitation Act generally limits the liability of a shipowner for claims brought under general maritime law or common law to the value of the vessel and the freight then pending.[1] 46 U.S.C. app. § 183. Rule F implements the provisions of the Limitation Act by providing a mechanism for the pro rata distribution among claimants of the fund created by the Limitation Act's liability limits. *See Beiswenger Enters. Corp. v. Carletta*, 86 F.3d 1032, 1036 (11th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 2455 (1997).

In 1872, the Supreme Court recognized that the Limitation Act did not establish any judicial procedure by

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[1] Congress enacted the Limitation Act to promote investment in shipbuilding. *British Transp. Comm'n v. United States*, 354 U.S. 129, 133, 77 S. Ct. 1103, 1105 (1957).

which a vessel owner could seek to enforce the Act's liability limits. *Norwich & N.Y. Transp. Co. v. Wright*, 80 U.S. (13 Wall.) 104, 123 (1871). To fill this void, the Court set forth a procedure by which vessel owners could initiate a limitation proceeding to establish a concursus of claims. *Id.* at 124-25. The Court codified this procedure by adding to the Rules of Practice for the Courts of the United States in Admiralty and Maritime Jurisdiction (Admiralty Rules). *See* Appendix to 80 U.S. (13 Wall.) (1871). Over time, the Admiralty Rules were variously amended, renumbered, and re-labeled. The present form, entitled the Supplemental Rules for Certain Admiralty and Maritime Claims (Rules A-F), was adopted in 1966.

Rule F(1) states that a "vessel owner may file a complaint in the appropriate district court . . . for limitation of liability pursuant to statute." Rule F(1) requires the vessel owner to deposit with the district court or a trustee a security in an amount tied to the "value of the owner's interest in the vessel and pending freight." After the shipowner posts security, Rule F(4) instructs the district court to "issue a notice to all persons asserting claims with respect to which the complaint seeks limitation, admonishing them to file their respective claims with the clerk of the court and to serve on the attorneys for the plaintiff a copy thereof on or before a date to be named in the notice." Upon the shipowner's request, Rule F(3) directs the district court to "enjoin the further prosecution of any action or proceeding against the plaintiff or the plaintiff's property with respect to any claim subject to limitation in the action." Claimants asserting valid

claims receive a pro rata distribution of "the fund deposited or secured, or the proceeds of the vessel and pending freight." Rule F(8).

OPA 90 explicitly supersedes the Limitation Act's liability limits with respect to claims for cleanup costs and damages resulting from a discharge of oil, and establishes its own schedule of liability limits for damages resulting from the oil discharge. 33 U.S.C. § 2704. The Owners allege their liability is limited under OPA 90 to $1,200 per gross ton per vessel. *See* 33 U.S.C. § 2704. OPA 90 also explicitly permits states to adopt laws imposing additional liability for oil spills above the liability limits established by OPA 90 and the Limitation Act. 33 U.S.C. § 2718. Consistent with this provision, the Florida Act imposes additional liability for oil spills.

B. *Procedural History*

Each Owner's complaint initiated a limitation proceeding in the district court, in which each Owner separately sought exoneration or limitation of their respective liability. The Owners of the petroleum-carrying tank barges sought limitation of liability under the Limitation Act for claims brought pursuant to general maritime and common law, and sought limitation of liability under OPA 90 and the Florida Act for claims resulting from the discharge of oil. The Owner of the freighter sought limitation of liability under the Liability Act only. Notices were issued to potential claimants that all claims against each of the Owners had to be filed in the respective limitation proceeding within 60 days or the right to recover from the Owners would be forfeited. Pursuant to

Rule F(3), the district court entered injunctions staying all other proceedings against the Owners in connection with the collision, thereby requiring that claims under OPA 90 and the Florida Act be brought in the limitation proceedings. Each injunction created a concursus of all claims against the respective Owner. The district court consolidated the three limitation actions with four other cases arising out of the collision, thereby creating a single, consolidated proceeding.

The claims filed against the Owners in the limitation proceeding include the following: (1) the Owners' claims against each other under general maritime law, OPA 90, the Florida Act, and common law; (2) one tug crew's claims under general maritime law and the Jones Act for personal injuries; (3) a Coast Guard reservist's claim under general maritime law for injuries resulting from exposure to petroleum during the rescue effort; (4) the United States' claims under general maritime law, common law, and OPA 90 for cleanup costs, damage to natural resources, and response and monitoring costs, as well as subrogation claims pursuant to OPA 90; (5) Florida's claims under OPA 90, the Florida Act, and general maritime law for clean-up costs, damage to natural resources, response costs, and reimbursement costs; and (6) private parties' claims, brought individually and as a purported class, under OPA 90, the Florida Act, common law, and general maritime law for damages suffered as a result of the spills.

This case has a long and complicated procedural history.[2] We are concerned here with three of the district court's rulings. First, the district court ruled that Florida is entitled to sovereign immunity from the limitation proceeding. Second, the district court dismissed without prejudice the OPA 90 claims, concluding that claims brought pursuant to OPA 90 are not subject to Rule F and therefore cannot be constrained to the limitation proceeding. Third, the district court dismissed without prejudice the Florida Act claims based on the same reasoning. The Owners appeal all three of these rulings. We reverse the district court's ruling that Florida is entitled to Eleventh Amendment immunity from the limitation proceeding, but affirm the district court's dismissal of the OPA 90 and Florida Act claims.

II. STANDARD OF REVIEW

We review de novo the district court's order dismissing Florida from the limitation proceeding on the basis of Eleventh Amendment immunity. *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016, 1021 (11th Cir. 1994), *aff'd*, 517 U.S. 44, 116 S. Ct. 1114 (1996). We also review de novo the district court's order dismissing the OPA 90 and Florida Act claims based on its conclusion that Rule F is not

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[2] This case has been before the Eleventh Circuit several times already. Most recently, this Court determined that the district court had to rule on Florida's claim of Eleventh Amendment immunity before the district court could require Florida to participate in mediation. *In re Bouchard Transp. Co. v. Florida Dept. of Envtl. Protection*, 91 F.3d 1445, 1448-49 (11th Cir. 1996).

applicable to those claims. *See DeKalb County Sch. Dist. v. Schrenko*, 109 F.3d 680, 687 (11th Cir.), *cert. denied* ___ U.S. ___, 118 S. Ct. 601 (1997).

III. DISCUSSION

A. Whether Florida is Entitled to Eleventh Amendment Immunity from the Limitation Proceeding

Florida filed various claims in the limitation proceeding pursuant to the Florida Act, OPA 90, and general maritime law. Florida asserts that it is entitled to Eleventh Amendment immunity from the limitation proceeding and, therefore, that its claims should not be subject to the limitation proceeding. We must resolve this assertion of sovereign immunity before we may address the other issues involved in this appeal. *Seaborn v. State of Fla., Dep't of Corrections*, ___ F.3d ___, ___ (11th Cir. 1998). No Court of Appeals has addressed this issue.[3]

The Eleventh Amendment prevents a suit in federal court against a state by a citizen of that state or any other state. *California v. Deep Sea Research*, ___ U.S. ___, ___, 118 S. Ct. 1464, 1470 (1998).[4] We therefore must determine

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[3] Two district courts have addressed this issue; both held that a limitation proceeding is not a suit against a state in violation of the Eleventh Amendment. *See In re Abaco Treasure Ltd.*, 1993 A.M.C. 1976, 1977 (S.D. Fla. 1993); *In re Sand Bar I, Inc.*, 1993 A.M.C. 1312, 1317 (E.D. La. 1992).

[4] Although the language of the Eleventh Amendment literally applies only to "any suit in law or equity," the Supreme Court has interpreted the Amendment's restrictions to include federal maritime jurisdiction. *Deep Sea Research*, ___ U.S. at ___, 118 S Ct. at 1471.

whether the filing of a limitation proceeding pursuant to Rule F constitutes a suit against Florida.

In ruling on this issue, the district court did not have the benefit of the Supreme Court's opinion in *Deep Sea Research*, which addresses the application of the Eleventh Amendment in the context of an admiralty in rem proceeding. *Id.* at ___, 118 S. Ct. at 1467. In *Deep Sea Research*, the Supreme Court rejected California's assertion of Eleventh Amendment immunity from an in rem admiralty action. *Id.* The Supreme Court held that the Eleventh Amendment does not bar an in rem admiralty action where the state does not have actual possession of the res:

> Based on longstanding precedent respecting the federal courts' assumption of *in rem* admiralty jurisdiction over vessels that are not in the possession of a sovereign, we conclude that the Eleventh Amendment does not bar federal jurisdiction over the *Brother Jonathan* and, therefore, that the District Court may adjudicate DSR's and the State's claims to the shipwreck.

Id. at ___, 118 S. Ct. at 1473.

Although this admiralty limitation proceeding is not an in rem action, it is sufficiently analogous for *Deep Sea Research* to compel the conclusion that Florida is not entitled to sovereign immunity. Like an in rem proceeding, the plaintiffs in the limitation proceeding neither named any specific entities as defendants in their complaints nor formally served process on any defendants.[5]

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[5] Although Rule F(2) requires that the complaint list all law suits pending against the vessel owner, the complaint does not

Instead, the plaintiffs posted security bonds with the district court in the amount of their maximum liability and the district court notified potential claimants to make their claims on the res deposited with the district court.[6] As in *Deep Sea Research*, Florida does not have possession of the disputed res – the bonds are part of the record of this case, currently in the possession of the federal judiciary. Accordingly, we hold that Florida is not entitled to Eleventh Amendment immunity from the limitation proceeding.

B. Whether Rule F Applies to Claims Brought Pursuant to OPA 90

Rule F does not specify the limitation statutes to which it applies. *See* Rule F(1). The Owners contend that Rule F generally applies to all limitation statutes. The Owners argue that OPA 90 is a limitation statute insofar as it limits the Owners' liability to $1,200 per gross ton for cleanup costs and natural damages, and that the OPA 90

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name the plaintiffs in those cases as defendants in the limitation proceeding. Instead, all claimants must enter the limitation proceeding on their own initiative by filing and serving a claim in accordance with Rule F(5).

[6] The Limitation Act substantively alters the claimants' common law and general maritime remedies – upon proof that the Owners are entitled to limit their liability, the Owners are effectively exonerated of in personam liability beyond the value of the vessel and pending freight. The Limitation Act therefore preempts all other general maritime and common law causes of action against the Owners outside of this limitation proceeding. Indeed, if Florida were immune from this proceeding, Florida would have no remedy at all for its general maritime and common law claims.

claims against them therefore must be resolved in a Rule F limitation proceeding.[7] More specifically, the Owners assert that there are two sets of limited funds that must be distributed among valid claims arising from the collision: (1) a set of funds, each equal to the value of the respective vessel, to be distributed pro rata among all valid maritime and common law claims subject to the Limitation Act; and (2) a set of funds, each equal to $1,200 per gross ton for the respective vessel, to be distributed pro rata among all valid OPA 90 claims. Therefore, the Owners contend, Rule F should apply to OPA 90 claims to the same extent it applies to claims subject to the Limitation Act. We disagree.

OPA 90 is not subject to Rule F for two reasons: (1) OPA 90 claimants do not face a limited fund necessitating a pro rata distribution; and (2) Congress has specifically set forth procedures to implement the strictures of OPA 90.

First, the Owners' theory is based on a false premise. OPA 90 claimants do not face a limited fund because OPA 90 uses the Oil Spill Liability Trust Fund (Fund) to ensure that every claim made pursuant to OPA 90 will be paid in full. 26 U.S.C. § 9509; 33 U.S.C. §§ 2712, 2713. Although OPA 90 limits the liability of the Owners for certain costs and damages arising from the oil spill in this case to $1,200 per gross ton, the Fund backstops the Owners'

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[7] OPA 90 provides various liability limits, depending on the nature of the accident. 33 U.S.C. § 2704. Although there are no facts of record in this appeal, the parties have proceeded on the assumption that $1,200 per gross ton is the applicable limit for each vessel in this case.

limited liability and ensures that every valid claim will be paid in full.[8] Accordingly, while OPA 90 is a limitation statute in some sense (i.e., it limits the ship owner's liability), it is not a limitation statute in the relevant sense – it does not limit the total amount of money that can be recovered by the claimants in this case. There is no need to bring all of the claimants into a single proceeding to make a pro rata distribution because every claim will be paid in full.

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[8] The Owners argue that OPA 90 does create a limited fund because the maximum amount that may be paid by the Fund with respect to any single incident is $1 billion. *See* 26 U.S.C. § 9509(c)(2)(A)(i). There has been no allegation that the claims in this case pose any danger of exceeding the $1 billion cap. Even if OPA 90 were judicially analogous to the Limitation Act and therefore subject to Rule F, this Circuit does not require claimants to proceed in a Rule F limitation proceeding absent the real possibility that some claims will not be paid:

> Courts have attempted to give effect to both the Limitation Act and the saving to suitors clause whenever possible, by identifying two sets of circumstances under which the damage claimants must be allowed to try liability and damages issues in a forum of their own choosing. The first circumstance arises where the limitation fund exceeds the aggregate amount of all the possible claims against the vessel owner. In such a case, the vessel owner is not exposed to liability in excess of the limitation fund, and thus the vessel owner's rights under the Limitation Act are not implicated.

Beiswenger, 86 F.3d at 1037 (citations omitted).

Second, OPA 90 is not subject to Rule F because, whereas the Limitation Act was enacted without procedural mechanisms, Congress expressly set forth procedures for implementing OPA 90. In reaching the same conclusion, the First Circuit summarized the claims procedures set forth in OPA 90:

> The OPA requires all claims for removal costs or damages to be presented first to the responsible party or guarantor. If the responsible party denies liability or the claim is not settled within 90 days, the claimant may proceed against the responsible party in court or present the claim to the Fund. In some enumerated instances, claims may be presented directly to the Fund without first presenting them to the responsible party. The purpose of the claim presentation procedure is to promote settlement and avoid litigation.

MetLife Capital Corp. v. M/V Emily S., 132 F.3d 818, 824 (1st Cir. 1997) (internal citations and quotations omitted), *cert. denied*, ___ U.S. ___, ___ S. Ct. ___, no. 97-1610, (June 26, 1998). Unlike the Limitations Act, OPA 90 can accomplish its statutory goals without the assistance of Rule F.

This conclusion is supported by principles of statutory construction. Comparing the OPA 90 statutory procedures with the Rule F procedures reveals two largely conflicting frameworks for resolving OPA 90 claims. For example, OPA 90 gives claimants three years to bring claims against a responsible party. 33 U.S.C. § 2717(f). OPA 90 also requires that claimants first present their claims to the responsible party, and then, if a claim is not settled within the requisite period of time, the claimant may proceed in court. 33 U.S.C. § 2713(a), (c). In some

instances, claimants may proceed directly to the OPA Fund and then subrogate to the United States the claims against the responsible party. 33 U.S.C. § 2715. If OPA 90 claims were subject to Rule F, every claim (including claims subrogated to the United States) would have to be brought within the period announced by the district court in the notice sent to potential claimants, which was 60 days in this case. Subjecting OPA 90 claims to Rule F effectively would allow ship owners to opt out of the Congressionally mandated procedures for resolving OPA 90 claims. Additionally, the venue provisions of OPA 90 permit claimants to proceed "in any district in which the discharge or injury or damages occurred, or in which the defendant resides, may be found, has its principal office, or has appointed an agent for service of process." 33 U.S.C. § 2717(b). The injunction issued by the district court in a Rule F proceeding would require OPA 90 claimants to proceed only in the district court chosen by the vessel owners, and the process envisioned by OPA 90's jurisdiction and venue provisions would be rendered meaningless. Similarly, OPA 90 grants jurisdiction to state courts to hear claims arising thereunder. 33 U.S.C. § 2717(c). This grant of concurrent jurisdiction would be rendered meaningless if OPA 90 claims were subject to Rule F because Rule F complaints must be filed in federal court. *MetLife*, 132 F.2d at 822.[9]

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[9] The Owners assert that this conflict of procedures is no different than the conflict that occurs when Jones Act claims are required to be brought in a Rule F limitation proceeding (e.g., the 3-year statute of limitations normally enjoyed by Jones Act claimants is replaced with the shorter period announced pursuant to Rule F). While it is true that Rule F procedures

In resolving the conflict between the Rule F procedures and the OPA 90 procedures, a fundamental principle of statutory construction requires that we apply the more specific procedures.[10] *San Pedro v. United States*, 79 F.3d 1065, 1069 (11th Cir.) ("We therefore follow the principle, upheld by the Supreme Court on numerous occasions, that a specific statute takes precedence over a more general one."), *cert. denied*, ___ U.S. ___, 117 S. Ct. 431 (1996). Furthermore, we avoid statutory constructions that render provisions meaningless. *Woodfork v. Marine Cooks & Stewards Union*, 642 F.2d 966, 970-71 (5th Cir. Apr. 1981)[11] ("A basic principle of statutory construction is that a statute should not be construed in such a way as to render certain provisions superfluous or insignificant." (internal quotations and citations omitted)). Consistent with these principles of statutory construction, OPA 90 claims must be resolved pursuant to the procedures contained in that statute, rather than replacing those procedures with Rule F.

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govern in the small percentage of Jones Act cases that implicate the liability limits of the Limitation Act, the Owners' theory would subject every OPA 90 claim to Rule F, giving ship owners the option to replace OPA 90's 3-year statutory period in every case.

[10] Although the Supplemental Rules for Certain Admiralty and Maritime Claims are not part of a Congressionally-enacted statute, the decision whether to apply those rules or the more specific procedures contained in OPA 90 is informed by general principles of statutory construction.

[11] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to close of business on September 30, 1981.

The Owners argue that Rule F must be applied to preserve judicial resources and avoid the burden of defending a multiplicity of suits in various fora. The Owners' understandable interest in consolidating this potentially unwieldy litigation does not overcome the Congressionally mandated procedures for adjudicating OPA 90 claims. This Circuit does not view the convenience of the shipowner as a legitimate goal of a Rule F limitation proceeding:

> Absent an insufficient fund (1) the statutory privilege of limiting liability is not in the nature of a *forum non conveniens* doctrine, and (2) the statute gives a ship-owner, sued in several suits no advantage over other kinds of defendants in the same position. Concourse is to be granted only when necessary in order to distribute an inadequate fund. The purpose of limitation proceedings is not to prevent a multiplicity of suits but, in an equitable fashion, to provide a marshalling of assets – the distribution pro rata of an inadequate fund among claimants, none of whom can be paid in full.

Pershing Auto Rentals, Inc. v. Gaffney, 279 F.2d 546, 550-51 (5th Cir. 1960) (internal citations and quotations omitted). Furthermore, neither Rule F not the Limitation Act grants the Owners a right to a concursus. Rule F merely provides a procedure for distributing a limited fund among competing claimants where the real possibility exists that some claims will not be paid in full:

> [W]here the value of the vessel and the pending freight, the fund paid into the proceeding by the offending owner, exceeds the claims made against it, there is no necessity for the maintenance of the concourse. . . .

> For us to expand the jurisdictional provisions of the Act to prevent respondent from now proceeding in her state case would transform the Act from a protective instrument to an offensive weapon by which the shipowner could deprive suitors of their common-law rights, even where the limitation fund is known to be more than adequate to satisfy all demands upon it. The shipowner's right to limit liability is not so boundless. The Act is not one of immunity from liability but of limitation of it and we read no other privilege for the shipowner into its language over and above that granting him limited liability.

Lake Tankers Corp. v. Henn, 354 U.S. 147, 152-53, 77 S. Ct. 1269, 1272 (1957).[12]

Rule F is designed to distribute a limited fund to multiple claimants where Congress has provided no statutory procedure for that distribution and where all claims cannot be paid in full. This case satisfies neither of these requirements – Congress has provided a procedure for implementing OPA 90 and the Fund will guarantee full payment of all valid OPA 90 claims arising from this oil discharge.

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[12] The Owners argue that the affirmative defense of limited liability will not work if multiple actions proceed in different courts. We disagree. OPA 90 establishes a limit of liability for the Owners. After paying out that amount, no cause of action will lie against the Owners pursuant to OPA 90. The remaining claims (or the remaining portions of claims) will be paid from the Fund.

C. Whether Rule F Applies to Claims Brought Pursuant to the Florida Act

OPA 90 authorizes states to adopt liability laws for oil spills and exempts those laws from the provisions of the Liability Act. 33 U.S.C. § 2718. Accordingly, the Florida Act is neither subject to the Limitation Act's provisions nor otherwise preempted. We will not impose Rule F on the Florida Act because, like OPA 90 claimants, Florida Act claimants do not face a limited fund. The Florida Act establishes the Florida Coastal Protection Trust Fund (Florida Fund) to ensure that all claims are paid in full despite the limitation of liability enjoyed by responsible parties. Fla. Ch. 376.11. Moreover, as discussed in the previous section of this opinion, the Owners do not have a general entitlement to a concursus; Rule F is not designed to make litigation more convenient for vessel owners.

Furthermore, the Florida Act sets forth an elaborate set of claims procedures to guide the administration of claims against responsible parties and against the Florida Fund. Fla. Stat. ch. 376.123. Rule F was designed to correct a procedural void in a federal law. Florida has left no such void in its liability scheme.

IV. CONCLUSION

In light of *Deep Sea Research*, the district court erred in ruling that Florida is entitled to Eleventh Amendment immunity from the limitation proceeding. The district court correctly dismissed without prejudice the claims

brought against the Owners under OPA 90 and the Florida Act.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
IN ADMIRALTY

TUG CAPT. FRED BOUCHARD CORP. et al., Plaintiffs, v. M/V BALSA 37, etc., et al., Defendants. _____/	CONSOLIDATED CASE NOS. 93-1321-CIV-T-23B 93-1326, 93-1363, 93-1366, 93-1399
IN THE MATTER OF THE COMPLAINT OF MARITRANS OPERATING PARTNERS LP and MARITRANS GENERAL PARTNER, INC. FOR EXONERATION FROM OR LIMITATION OF LIABILITY AS OWNER OF THE TUG SEAFARER, Official No. 532672 and BARGE OCEAN 255, Official No. 534910 _____/	CASE NO. 94-227-CIV-T-23B
IN THE MATTER OF THE COMPLAINT OF BOUCHARD TRANSPORTATION CO., INC., TUG CAPTAIN FRED BOUCHARD, INC., AND B. NO. 155 CORPORATION, FOR EXONERATION FROM OR LIMITATION OF LIABILITY AS OWNER OR AS OWNER PRO HAC VICE OF TUG CAPT. FRED BOUCHARD AND BARGE B. NO. 155. _____/	CASE NO. 94-233-CIV-T-23B

ORDER

(Filed Oct. 22, 1996)

Several claimants (i.e., United States, Florida Department of Environmental Protection, the purported "Updegraff class," and the purported "Boca Ciega Hotel, Inc., class") move to dismiss (Case No. 93-1399, Docs. 50-1, 50-2, 65-1, 65-2, 108-1, and 108-2; Case No. 94-227, Docs. 16, 88, 112, and 175; Case No. 94-233, Docs. 19, 78, 100, and 172) these limitation actions as to their claims pursuant to the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-19, and Florida's Pollutant Discharge Prevention and Control Act, Fla. Stat. §§ 376.011-.21. Upon consideration, the motions are **GRANTED.** *See In re Jahre SPRAY II K/S,* 1996 WL 451315 (D.N.J. August 5, 1996). Neither OPA, Supplemental Rule F, nor their legislative history unequivocally suggest that the claimants are required to lodge their oil spill claims exclusively in these concursus proceedings, regardless of whether the resolution of those claims would be governed by the substantive provisions contained in the applicable statute. To the contrary, a disinterested reading of the materials cited by the parties leads to the troublesome conclusion that the claimants may assert those claims independent of these proceedings.

Florida Department of Environmental Protection's motions to dismiss (Case No. 94-227, Docs. 111 and 152; Case No. 94-233, Docs. 99 and 139) based on the Eleventh Amendment are **GRANTED.** The vessel owners rely almost exclusively on *In re Sand Bar I, Inc.,* 1993 A.M.C. 1312 (E.D. La. 1992) and *In re Abaco Treasure Ltd.,* 1993 A.M.C. 1976 (S.D. Fla. 1993). However, those cases

embrace a legal fiction that fails to withstand scrutiny under recent Eleventh Circuit and Supreme Court decisions (cited by the DEP) that expound Eleventh Amendment jurisprudence. *See, e.g., Seminole Tribe of Florida v. Florida*, ___ U.S. ___, 116 S.Ct. 1114 (1996); *see also In re Williamson Towing Co, Inc.*, 534 F.2d 758 (7th Cir. 1976). Further, *Sand Bar I, Inc.* specifically rejects the vessel owners' principal argument that the DEP "waived" its right to immunity by filing in these actions affirmative claims for relief. 1993 A.M.C. at 1313 n.1. The DEP's decision to file those claims was far from voluntary – it was mandated by this Court's order requiring all claimants to file their claims or face default.

Accordingly, the injunctions issued in these limitation proceedings shall not apply (1) to the claims brought by the DEP, under any theory, for pollution removal costs and damages as described in the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-19, and Florida's Pollutant Discharge Prevention and Control Act, Fla. Stat. §§ 376.011-.21, (2) to the claims brought by the remaining claimants pursuant to either the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-19, or Florida's Pollutant Discharge Prevention and Control Act, Fla. Stat. §§ 376.011-.21, or (3) to the claims brought by the United States pursuant to either the Clean Water Act, 33 U.S.C. §§ 1251-1376 or the Rivers and Harbors Act, 33 U.S.C. §§ 401-67.[1] The

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[1] The vessel owners raise significant and legitimate concerns regarding prejudice, inconsistent rulings, judicial economy, splitting of claims, unnecessary expenditure of resources, and the like. They advanced those concerns with skill and determination. I concede that I experience a degree of uneasiness with the effect of today's ruling. As I announced at

claimants are permitted to withdraw the claims subject to this order. All other claims shall remain. The counter-claims against the DEP are dismissed without prejudice.

ORDERED in Tampa, Florida, on October 22nd, 1996.

/s/ Steven D. Merryday
Steven D. Merryday
United States District Judge

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the conclusion of oral argument, this is one of those instances when the result that makes the most sense (and the result that perhaps ought to be pursued) is either inconsistent with or not permitted by a combination of the prevailing law and the parties. Perhaps the Eleventh Circuit will disagree with my view or the legislative and judicial bodies responsible for promulgating the governing statutes and rules will provide some clarity and guidance. Both the effect of this order and these limitation actions (as they pertain to the moving claimants) are STAYED pending the resolution of any appeals.

At the September 10, 1996, status conference, the vessel owners informed the court that they intend to proffer to the DEP and the United States a "global" settlement that would resolve the asserted claims. Pursuant to 11th Cir. R. 33-1(c), the Eleventh Circuit may wish to conduct a settlement conference. As a skilled facilitator possessing significant knowledge about the issues raised in these proceedings, Peter J. Grilli is a candidate worthy of serving as the conference attorney.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

IN ADMIRALTY

IN THE MATTER OF THE COMPLAINT OF BOUCHARD TRANSPORTATION CO., INC., TUG CAPTAIN FRED BOUCHARD INC., AND B NO. 155 CORPORATION, FOR EXONERATION FROM OR LIMITATION OF LIABILITY AS OWNER OR AS OWNER *PRO HAC VICE* OF TUG CAPT. FRED BOUCHARD AND BARGE B. NO. 155.

CASE NO. 94-233-Civ-T-21B

_____/

INJUNCTION

Plaintiffs, BOUCHARD TRANSPORTATION CO., INC., TUG CAPTAIN FRED BOUCHARD INC., and B NO. 155 CORPORATION (collectively "BOUCHARD"), having on February 9, 1994, filed a Complaint for exoneration from or limitation of liability in respect to losses and damages arising out of a voyage of Tug CAPT. FRED BOUCHARD and Barge B. NO. 155 on August 10, 1993, and BOUCHARD having stated in its Complaint the facts and circumstances upon which exoneration from or limitation of liability are claimed, and having filed an *ad interim* Stipulation of value, duly executed by BOUCHARD, as Principal, the performance of which has been secured in accordance with the rules and practice of

this Court, and it appearing that BOUCHARD desires to obtain a restraining order, it is

ORDERED that the further prosecution of any pending actions, suits or legal proceedings in any court whatsoever, and the institution and prosecution of any suits, actions, or legal proceedings of any nature or description whatsoever in any court whatsoever, except in this proceeding for exoneration from or limitation of liability, against BOUCHARD TRANSPORTATION CO., INC., TUG CAPTAIN FRED BOUCHARD INC., or B NO. 155 CORPORATION or against Tug CAPT. FRED BOUCHARD and Barge B. NO. 155 or other property or their underwriters in respect of any claim or claims arising out of or connected with the aforesaid voyage of August 10, 1993, be, and the same are hereby, stayed and restrained until the hearing and determination of this proceeding; and it is further

ORDERED, that the notice provision of subsection (4) of Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims (Rule F) and the Claims and Answer provisions of subsection (5) of Rule F are not to apply to any person who presents a claim to Turnaboat Services, Ltd. for oil pollution damages as defined in the Oil Pollution Act of 1990, 33 U.S.C. §2702, unless and until that person brings a lawsuit in any Court, at which time Plaintiffs must serve Notice on that person in accordance with Rule F(4) and thereupon that person shall file a claim and answer herein in accordance with Rule F(5).

ORDERED that service of this Injunction as a restraining order may be made by mailing a copy of this

Injunction to the person or persons to be restrained or to their respective attorneys or representatives.

DONE AND ORDERED in Chambers at Tampa, Florida this 9th day of February, 1994

/s/ Thomas G. Wilson
UNITED STATES
MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

IN ADMIRALTY

IN THE MATTER OF THE COMPLAINT OF BOUCHARD TRANSPORTATION CO., INC., TUG CAPTAIN FRED BOUCHARD INC., AND B NO. 155 CORPORATION, FOR EXONERATION FROM OR LIMITATION OF LIABILITY AS OWNER OR AS OWNER *PRO HAC VICE* OF TUG CAPT. FRED BOUCHARD AND BARGE B. NO. 155.

CASE NO. 94-233-Civ-T-21B

_____/

MONITION

The President of the United States, to the Marshal of the United States for the Middle District of Florida, greetings:

WHEREAS, a Complaint was filed in the United States District Court for the Middle District of Florida on February 9, 1994, by BOUCHARD TRANSPORTATION CO., INC., TUG CAPTAIN FRED BOUCHARD INC., and B NO. 155 CORPORATION (collectively "BOUCHARD") for exoneration from or limitation of liability as owner of Tug CAPT. FRED BOUCHARD and Barge B. NO. 155 in respect to losses and damages occasioned by or occurring on the voyage upon which the said vessels were engaged on August 10, 1993, for the reasons mentioned in the said Complaint, and praying that a monition issue out of said

Court citing all persons claiming damages by reason of the matters aforesaid to appear before said Court and to make due proof of their respective claims and to answer the allegations of the Complaint, and that if it shall appear that BOUCHARD is not liable for any such losses and damages it may be so finally decreed by this Court, or if it shall appear that BOUCHARD is liable for any such losses and damages that BOUCHARD's liability be limited to the amount or value of the interest of BOUCHARD TRANSPORTATION CO., INC., TUG CAPTAIN FRED BOUCHARD INC., and B NO. 155 CORPORATION in the said vessels at the end of the voyage upon which the vessels were engaged at the time described in the Complaint, and/or the limitation amount set forth in 33 U.S.C. § 2704 or *Fla. Stat.* 376.12(1) (1993) or any other applicable limitation law, and praying for other further relief; and

WHEREAS, BOUCHARD has filed in the office of the Clerk of the District Court an *ad interim* Stipulation undertaking to pay into the Court within ten (10) days after the entry of an order herein appraising the value of the said vessels at the end of the said voyage, the amount or value of such interest as thus ascertained or to file in the proceeding a bond or stipulation for value in the usual form, with surety, in said amount, and the Court having directed by an order made and entered on the 9th day of February, 1994, that a monition issue against all persons claiming damages for any losses and damages arising during the said voyage, citing them to file their respective claims for oil pollution damages, as defined in the Oil Pollution Act of 1990, 33 U.S.C. §2702, if they have not done so to date, with the representative of plaintiff, to

wit: Turnaboat Services., Ltd., 7110 Gulf Boulevard, St. Petersburg, Florida 33706 in accordance with the Oil Pollution Act of 1990, 33 U.S.C. §2713(a) on or before April 11, 1994.

Also citing all persons with claims for damages other than Oil Pollution damages, as defined in the Oil Pollution Act of 1990, 33 U.S.C. §2702 to file their claims with the Clerk of the Court and to serve on and mail to the attorneys for BOUCHARD a copy thereof on or before April 11, 1994.

And also citing those persons who have brought lawsuits for oil pollution damages, as defined in the Oil Pollution Act of 1990, 33 U.S.C. §2702 to file their claims with the Clerk of the Court and to serve on or mail to the attorneys for BOUCHARD a copy thereof within 60 days after the commencement of their lawsuit or within 60 days after the date of this Monition, whichever is later.

You are therefore commanded to cite all persons claiming oil pollution damages as defined in the Oil Pollution Act of 1990, 33 U.S.C. §2702 to file their claims with the representative of plaintiffs, to wit: Turnaboat Services, Ltd., 7110 Gulf Boulevard, St. Petersburg, Florida 33706, if they have not done so already, in accordance with the Oil Pollution Act of 1990, 33 U.S.C. §2713(a) and for all persons claiming damages other than oil pollution damages, as defined in the Oil Pollution Act of 1990, 33 U.S.C. §2702 arising out of the said voyage or the collision of August 10, 1993, to file their claims with the Clerk of the Court and to serve on or mail to Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., Post Office Box

1438, Tampa, Florida 33601 attorneys for BOUCHARD, a copy thereof on or before April 11, 1994, and

You are also commanded to cite all persons who have brought lawsuits for oil pollution damages, as defined in the Oil Pollution Act of 1990, 33 U.S.C. §2701 to file their claims with the Clerk of the Court and to serve on or mail to Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., Post Office Box 1438, Tampa, Florida 33601, attorneys for BOUCHARD, a copy thereof on or before 60 days after the commencement of their lawsuit or within 60 days after the date of this Monition, whichever is later.

You are also commanded to cite those persons who have brought lawsuits for oil pollution damages, as defined in the Oil Pollution Act of 1990, 33 U.S.C. §2702 and all persons with claims for damages other than oil pollution damages, as defined in the Oil Pollution Act of 1990, 33 U.S.C. §2702 to appear and answer the Complaint herein on or before the date last named or within such further time as the Court may grant and to have and to receive such further relief as may be due.

And what you have done in the premises, do you then make return to this Court together with this writ.

WITNESS the Honorable THOMAS G. WILSON, United States Magistrate Judge for the Middle District of Florida, this 10th day of February, 1994.

DAVID L. EDWARDS, CLERK

By: /s/ Ginger K. McGurk
Deputy Clerk

CARL R. NELSON
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SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS

Rule F. Limitation of Liability

(1) Time for Filing Complaint; Security. Not later than six months after receipt of a claim in writing, any vessel owner may file a complaint in the appropriate district court, as provided in subdivision (9) of this rule, for limitation of liability pursuant to statute. The owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the owner's interest in the vessel and pending freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of the statutes as amended; or (b) at the owner's option shall transfer to a trustee to be appointed by the court, for the benefit of claimants, the owner's interest in the vessel and pending freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of the statutes as amended. The plaintiff shall also give security for costs and, if the plaintiff elects to give security, for interest at the rate of 6 percent per annum from the date of the security.

(2) Complaint. The complaint shall set forth the facts on the basis of which the right to limit liability is asserted and all facts necessary to enable the court to determine the amount to which the owner's liability shall be limited. The complaint may demand exoneration from as well as limitation of liability. It shall state the voyage if any, on which the demands sought to be limited arose,

with the date and place of its termination; the amount of all demands including all unsatisfied liens or claims of lien, in contract or in tort or otherwise, arising on that voyage, so far as known to the plaintiff, and what actions and proceedings, if any, are pending thereon; whether the vessel was damaged, lost, or abandoned, and, if so, when and where; the value of the vessel at the close of the voyage or, in case of wreck, the value of her wreckage, strippings, or proceeds, if any, and where and in whose possession they are; and the amount of any pending freight recovered or recoverable. If the plaintiff elects to transfer the plaintiff's interest in the vessel to a trustee, the complaint must further show any prior paramount liens thereon, and what voyages or trips, if any, she has made since the voyage or trip on which the claims sought to be limited arose, and any existing liens arising upon any such subsequent voyage or trip, with the amounts and causes thereof, and the names and addresses of the lienors, so far as known; and whether the vessel sustained any injury upon or by reason of such subsequent voyage or trip.

(3) Claims Against Owner; Injunction. Upon compliance by the owner with the requirements of subdivision (1) of this rule all claims and proceedings against the owner or the owner's property with respect to the matter in question shall cease. On application of the plaintiff the court shall enjoin the further prosecution of any action or proceeding against the plaintiff or the plaintiff's property with respect to any claim subject to limitation in the action.

(4) Notice to Claimants. Upon the owner's compliance with subdivision (1) of this rule the court shall issue

a notice to all persons asserting claims with respect to which the complaint seeks limitation, admonishing them to file their respective claims with the clerk of the court and to serve on the attorneys for the plaintiff a copy thereof on or before a date to be named in the notice. The date so fixed shall not be less than 30 days after issuance of the notice. For cause shown, the court may enlarge the time within which claims may be filed. The notice shall be published in such newspaper or newspapers as the court may direct once a week for four successive weeks prior to the date fixed for the filing of claims. The plaintiff not later than the date of second publication shall also mail a copy of the notice to every person known to have made any claim against the vessel or the plaintiff arising out of the voyage or trip on which the claims sought to be limited arose. In cases involving death a copy of such notice shall be mailed to the decedent at the decedent's last known address, and also to any person who shall be known to have made any claim on account of such death.

(5) Claims and Answer. Claims shall be filed and served on or before the date specified in the notice provided for in subdivision (4) of this rule. Each claim shall specify the facts upon which the claimant relies in support of the claim, the items thereof, and the dates on which the same accrued. If a claimant desires to contest either the right to exoneration from or the right to limitation of liability the claimant shall file and serve an answer to the complaint unless the claim has included an answer.

(6) Information to be Given Claimants. Within 30 days after the date specified in the notice for filing claims, or within such time as the court thereafter may allow, the plaintiff shall mail to the attorney for each

claimant (or if the claimant has no attorney to the claimant) a list setting forth (a) the name of each claimant, (b) the name and address of the claimant's attorney (if the claimant is known to have one), (c) the nature of the claim, i.e., whether property loss, property damage, death, personal injury etc., and (d) the amount thereof.

(7) Insufficiency of Fund or Security. Any claimant may by motion demand that the funds deposited in court or the security given by the plaintiff be increased on the ground that they are less than the value of the plaintiff's interest in the vessel and pending freight. Thereupon the court shall cause due appraisement to be made of the value of the plaintiff's interest in the vessel and pending freight; and if the court finds that the deposit or security is either insufficient or excessive it shall order its increase or reduction. In like manner any claimant may demand that the deposit or security be increased on the ground that it is insufficient to carry out the provisions of the statutes relating to claims in respect of loss of life or bodily injury; and, after notice and hearing, the court may similarly order that the deposit or security be increased or reduced.

(8) Objections to Claims: Distribution of Fund. Any interested party may question or controvert any claim without filing an objection thereto. Upon determination of liability the fund deposited or secured, or the proceeds of the vessel and pending freight, shall be divided pro rata, subject to all relevant provisions of law, among the several claimants in proportion to the amounts of their respective claims, duly proved, saving, however, to all parties any priority to which they may be legally entitled.

(9) Venue; Transfer. The complaint shall be filed in any district in which the vessel has been attached or arrested to answer for any claim with respect to which the plaintiff seeks to limit liability; or, if the vessel has not been attached or arrested, then in any district in which the owner has been sued with respect to any such claim. When the vessel has not been attached or arrested to answer the matters aforesaid, and suit has not been commenced against the owner, the proceedings may be had in the district in which the vessel may be, but if the vessel is not within any district and no suit has been commenced in any district, then the complaint may be filed in any district. For the convenience of parties and witnesses, in the interest of justice, the court may transfer the action to any district; if venue is wrongly laid the court shall dismiss or, if it be in the interest of justice, transfer the action to any district in which it could have been brought. If the vessel shall have been sold, the proceeds shall represent the vessel for the purposes of these rules.

FILED
NOV 4 - 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-682

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

BOUCHARD TRANSPORTATION COMPANY, et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eleventh Circuit

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RESPONSE IN OPPOSITION TO BOUCHARD'S PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

[as framed by Petitioner]

I. Whether district courts exercising their admiralty and maritime jurisdiction should apply the procedure of Supplemental Rule F to implement the limitation of liability provisions of the Oil Pollution Act of 1990 (OPA 90).

II. If not, whether this Court will make the rules needed to fill the resulting procedural void as it did in a similar situation in Norwich v. Wright, 80 U.S. (13 Wall.) 104, 125 (1871).

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Supplemental Rule F, Fed.R.Civ.P. 6

No. 98-682

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

BOUCHARD TRANSPORTATION CO., INC., et al.,

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vs.

UNITED STATES OF AMERICA, et al.,

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On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eleventh Circuit

---

RESPONSE IN OPPOSITION TO BOUCHARD'S PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Preliminarily, Respondent, the Florida Department of Environmental Protection (DEP), has filed a separate petition for certiorari seeking review of the decision below. DEP seeks review of the ruling that the Eleventh Amendment does not bar compelling a state into admiralty court through the Limitation of Liability Act. Otherwise, DEP accepts Petitioners' statement with the following clarifications.

Petitioners Bouchard and Maritrans make no mention of their counterclaims against DEP, which were dismissed without prejudice. (*See* petitioners' app., p. 24) Together, these counterclaims seek damages of more than $150 million, due to Florida's alleged negligence, etc.[1] Based on the gross tonnages of their respective tank barges, Bouchard and Maritrans concurrently seek to limit their liability under OPA 90 (oil spill damages) to about $28.7 million. *(See* petition, p. 9, n. 4.) For other claims, Bouchard and Maritrans stipulated to vessel and cargo values totaling $13.2 million.

All Petitioners (the "vessel owners") state categorically that the district court's order "did not affect claims to the extent they were based on the general maritime law and on Florida common law, which are subject to limitation under the 1851 Limitation Act." (*See* petition, p 7.) This statement is incorrect. The district court also granted DEP's motion to dismiss on Eleventh Amendment grounds. Therefore, Florida could not be compelled to press its claims in federal court. Claims lodged by DEP would not necessarily go forward "in any event," as the vessel owners depict. Again, the Eleventh Circuit's reversal of this ruling is the subject of DEP's separate petition for certiorari.

REASONS FOR DENYING THE WRIT

I. The Question of Law Decided Below Is Not "Important" For Purposes Of Certiorari Review, And Does Not Need To Be Settled By This Court.

Despite their effort to tell this Court why the decision below was wrong, the vessel owners devote not one word to why

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[1]Bouchard's counterclaims, alone seeking $75 million, are reproduced as appendix C of DEP's petition for certiorari. *See* pages 28-9 of that appendix.

immediate review by certiorari is appropriate. This lapse is perhaps explained by the express rationale of the decision below. In reaching its holding that claims under the federal and Florida oil spill laws were not subject to the Limitation Act, the Eleventh Circuit correctly treated the issue as one of statutory construction. *See* Bouchard Transp. Co., Inc. v. Updegraff, 147 F.3d 1344, 1347 & 1349-52 (11th Cir. 1998) (concluding OPA 90 "explicitly supersedes the Limitation Act's liability limits"and observing: "This conclusion is supported by principles of statutory construction.").

An issue of statutory construction simply does not possess the inherent importance as does, for example, the issue of Eleventh Amendment immunity. *See* Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.,506 U.S. 139, 146 (1993) (applying collateral order doctrine to orders denying 11th Amendment immunity, and observing that the "ultimate justification" for such application is "ensuring that the States' dignitary interests can be fully vindicated"). If, then, the vessel owners seek certiorari based on the importance of the federal question, they have utterly failed to establish the question is of sufficient importance to warrant immediate review.

As they did below, the vessel owners rely on a faulty premise. *See* Bouchard, 147 F.3d at 1350 ("[T]he Owners' theory is based on a false premise."). Here, the vessel owners assert they will be "left with a right but no procedure to enforce the right." (petition, p. 10) This statement is falsely premised on the assumption that there is a right to compel all claims under OPA 90 and Florida's oil spill law into a single proceeding against a single fund. Also, the owners have ignored the fact OPA 90's separate liability limits are available should DEP proceed in state court.

The vessel owners' fear of multiple lawsuits under OPA 90 is

not a ground for granting certiorari. Throughout the country, large accidents routinely spawn numerous lawsuits, not necessarily in a single forum. Congress accepted this possibility when it enacted separate procedures, outside the Limitation Act, for limiting liability under OPA 90.

Continuing this theme, the vessel owners contend they could face multiple lawsuits, each (instead of all) limited to the maximum liability under OPA 90, and thereby be faced with greater liability than Congress intended. (petition, p. 11-12) This point is speculative. It would not arise unless the damages obtained for all OPA 90 claims, in all lawsuits, exceeded both the vessel owners' maximum liability and the $1 billion reimbursement cap for the federal Oil Spill Liability Trust Fund. The claims in this case cannot possibly exceed $1 billion. Therefore, the Eleventh Circuit did not reach the issue, which should not be a basis for granting certiorari.[2] *See* Bouchard, 147 F.3d at 1350, n. 8 (declining to construe OPA 90 as creating a limited fund requiring proration of claims in a single proceeding, when there was "no allegation that the claims in this case pose any danger of exceeding the $1 billion cap.").

By writing OPA 90 the way it did, Congress favored compensation for those damaged by oil spills over the convenience of vessel owners. The decision below read OPA 90 correctly, and in accord with the First Circuit's interpretation of the same statute. The vessel owners do not show any particular importance or urgency in their first question. Certiorari is not justified.

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[2]Similarly, the Eleventh Circuit did not address the owners' speculation that vessels could be subjected to "multiple arrests or attachments."

II. The Decision Below Does Not Conflict With A Relevant Decision By This Court Or Another Circuit Court Of Appeals.

The vessel owners do not allege conflict between the decision below and relevant decisions of this Court. *See* Supreme Court Rule 10(c). At most, they occasionally cite to decisions by this Court for tangential points. For example, they cite to United States v. Bestfoods, __ U.S. __, 118 S.Ct. 1876 (1998), for the curious observation that polluters' rights deserve the same respect as victim's rights. (petition, p. 11)

The vessel owners also fail to allege any conflict between the decision below and a decision by another circuit court "on the same important matter." *See* Supreme Court Rule 10(a). To the contrary, the vessel owners (petition, p. 10) concede the decision below is in accord with a decision by the First Circuit, Metlife Capital Corp. v. M/V Emily S., 132 F.3d 818 (1st Cir.1997), *cert. denied*, __ U.S. __, 118 S.Ct. 2367 (1998). *See also*, Bouchard, 147 F.3d at 1350-51 (citing to Metlife). Effectively, the vessel owners are using their petition to express disagreement with the First Circuit also.

The second question is little more than variation upon the first: "Only when claims are marshaled into a single forum" will a vessel owner be able to limit liability. (petition, p. 12) The flaw of such logic is obvious. Congress, by providing other liability limits and procedures in OPA 90, and by preserving state oil spill laws, has established different public policy as law of the land. However desirable a *concursus* of a state's OPA 90 and state law claims in a single court may be to vessel owners, it was not sufficiently desirable to Congress for the law to be written as the vessel owners now wish. Whatever the merit of the vessel owners' position as a matter of public policy, that position is meritless as a ground for certiorari review.

In their last point, the vessel owners rely on the use of "statute" in Supplemental Rule F, Fed.R.Civ.P., as adopted in 1966. They claim "statute" indicates an intent by this Court to "expand the application of Supplemental Rule F beyond the 1851 Limitation Act." (petition, p. 15) Marginally, the vessel owners would portray this case as involving the construction of Rule F.

The owners do not intimate how--under separation of powers--this Court could adopt a procedural rule in 1966 which trumped a 1990 substantive law; that is, OPA 90. The express purpose of Rule F was to fill a void left by Congress when it adopted the original Limitation Act. As the decision below noted, there is no void to fill in OPA 90. *See* Bouchard, 147 F.3d at 1350 ("whereas the Limitation Act was enacted without procedural mechanisms, Congress expressly set forth procedures for implementing OPA 90"). Again, the vessel owners have raised a point does not justify granting certiorari.

III. Petitioners' Request For Rulemaking By This Court Is Not A Ground For Certiorari Review.

In the third question presented, the vessel owners contend their perceived need for rulemaking by this Court is a ground for certiorari review. They follow with a superfluous discussion of statutory provisions for promulgation of rules by this Court. They end with the undisputed but irrelevant observation that this Court, as the final arbiter of admiralty law, must have the authority to enact necessary rules. (petition, p. 18)

The vessel owners do not suggest how the need for new rules, if such need exists, supports the grant of certiorari. The exact opposite makes more sense. If there is a need for new rules, those rules should be proposed, circulated and developed nationally. They should not emerge from one factually unique

case, which is inherently adversarial rather than "legislative" in character.

Nothing in this Court's rules or jurisprudence indicates the need for quasi-legislative rulemaking justifies certiorari. The vessel owners' third ground for certiorari does not present a true "question," and is meritless.

CONCLUSION

Bouchard's petition for writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 98-682

In The

Supreme Court of the United States

October Term, 1998

BOUCHARD TRANSPORTATION COMPANY, et al.,

Petitioners,

vs.

THE UNITED STATES OF AMERICA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BOCA CIEGA'S BRIEF IN OPPOSITION TO BOUCHARD'S PETITION FOR A WRIT OF CERTIORARI

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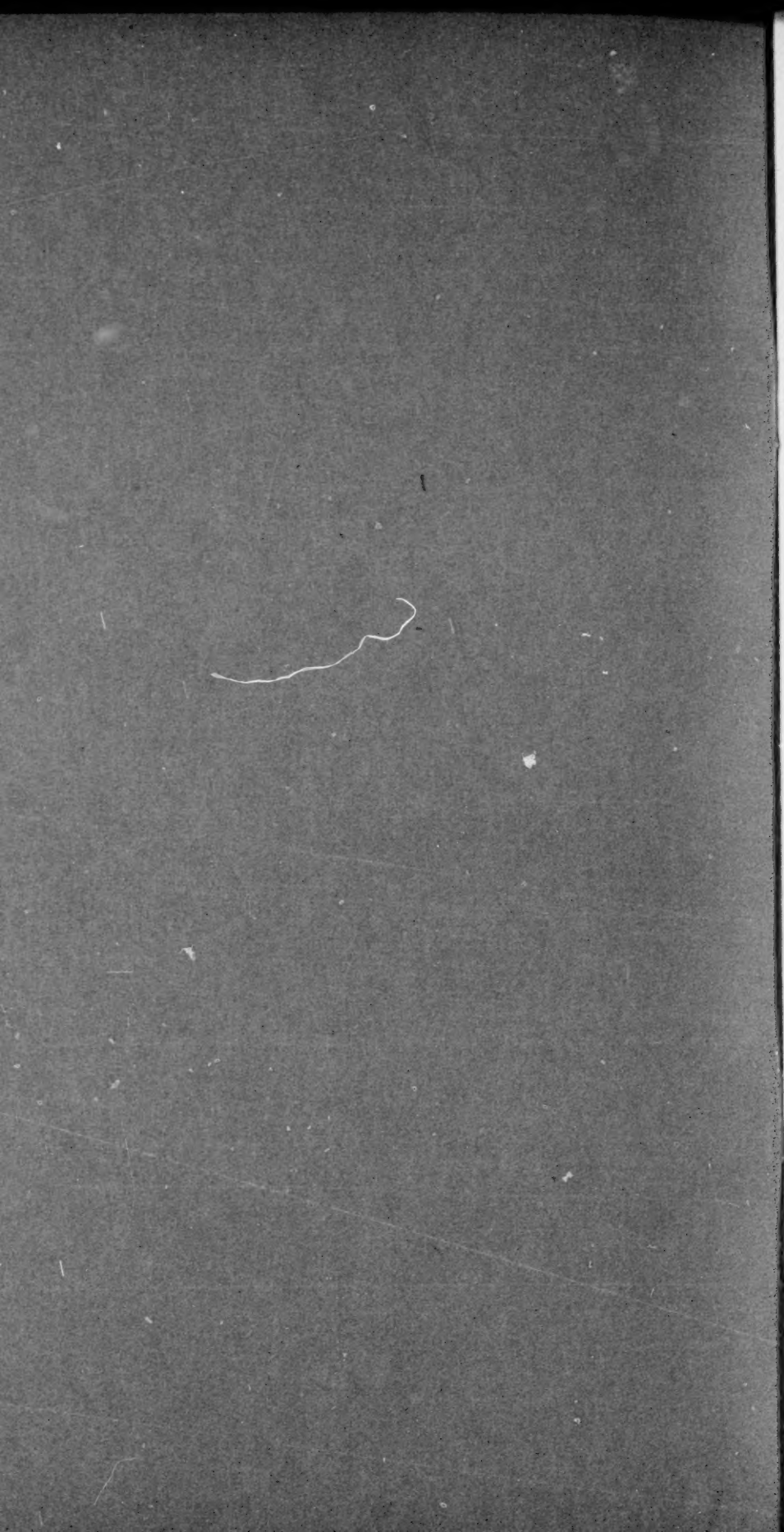

QUESTIONS PRESENTED

[*as framed by Petitioner*]

I. Whether district courts exercising their admiralty and maritime jurisdiction should apply the procedure of Supplemental Rule F to implement the limitation of liability provisions of the Oil Pollution Act of 1990 (OPA 90).

II. If not, whether this Court will make the rules needed to fill the resulting procedural void as it did in a similar situation in *Norwich v. Wright*, 80 U.S. (13 Wall.) 104, 125 (1871).

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SUPREME COURT RULE 29.6 STATEMENT

BOCA CIEGA HOTEL, INC. has no parent or subsidiary companies.

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STATEMENT OF THE CASE

On August 10, 1993, two tug-barge flotillas and a freighter were involved in a collision in the mouth of Tampa Bay. Thousands of gallons of petroleum and petroleum products were spilled into Florida's navigable waters. By evening of Sunday, August 15th, the discharged petroleum had made its way onto some sixteen miles of popular beaches or beach front property in Pinellas County. The oil spill resulted in substantial economic loss to business owners that relied on the attraction of the once pristine Pinellas County beaches for their patrons.

On September 16, 1993, claimants Boca Ciega Hotel, Inc., Barry and Brenda Jones, All Suite Motel, John Jones, Yiannis Koukoulis, Ahmad Shihadeh, Mary Beth Geiken and Don and Joan Tobin (the "Boca Ciega claimants") filed a lawsuit on behalf of themselves and all others similarly situated. Among other claims, the suit alleged violations of the Oil Pollution Act of 1990 [OPA 90], 33 U.S.C. Sec. 2701 et seq. The claimants are business owners and operators, employees of such businesses, or tourists, who have sustained economic damages from the oil spill. Their individual claims for damages range from $1,500.00 for an employee, up to $300,000.00 for a hotel owner claimant.

The vessel owners filed petitions for limitation of liability and contended that all claims had to be filed within the limitation proceeding. After prolonged litigation and several appeals, the lower courts determined that the plaintiffs should be free to pursue their claims

outside the limitation proceedings. The Boca Ciega plaintiffs have waited for five years to be compensated for their losses. These claimants respectfully request the Court to deny the vessel owners' Petition for a Writ of Certiorari so that their claims can be resolved on the merits.

REASONS FOR DENYING THE WRIT

1. There Is No Conflict Between The Circuit Courts Of Appeal Or With Any Relevant Decision Of This Court

None of the criteria that would justify review by a writ of certiorari are present here. There is no conflict in the circuit courts of appeal. In fact, the only two circuits to have addressed the issues raised by the vessel owners have reached the same conclusion: that Supplemental Rule F does not apply to actions commenced under OPA 90. See *Metlife Capital Corp. v. M/V Emily S.*, 132 F.3d 818 (1st Cir. 1997), *cert. denied*, ___U.S.___, 118 S.Ct. 2367 (1998); *Bouchard Transportation Co. v. Updegraff*, 147 F.3d 1344 (11th Cir. 1998). Nor do the Petitioners cite any relevant decision of the Supreme Court which is in conflict with the decision of the Eleventh Circuit in this case.

2. The Questions Presented By The Petitioners Are Not Important Questions Requiring Resolution By The Supreme Court

This case does not raise any question that is of such pressing importance that it must be settled by the

Supreme Court. In enacting OPA, Congress comprehensively addressed the substantive rights of claimants and the procedures to be used for obtaining redress for damages caused by oil spills. The statute and the legislative history make crystal clear that OPA completely supersedes the Limitation Act of 1851. The vessel owners attempt to get around this incontrovertible fact by arguing that Supplemental Rule F to OPA, a rule of civil procedure, creates an independent right to concursus. As the Eleventh Circuit has held, this argument fails for two reasons: (1) OPA claimants do not face a limited fund necessitating a pro rata distribution; and (2) Congress has specifically set forth procedures to implement the strictures of OPA 90. *Bouchard*, 147 F.3d at 1350. Application of Supplemental Rule F would thwart the legislative purpose and violate the Rules Enabling Act because it would modify substantive rights created by Congress.

The purpose of concursus which underlies the Limitation Act of 1851 is not, as the owners suggest, to avoid a multiplicity of lawsuits. Rather, concursus is granted only when necessary to distribute an inadequate fund among multiple claimants. OPA provides that those injured will be fully compensated by the responsible party or by the Oil Spill Liability Trust Fund ("the Fund") and further provides that the responsible party may obtain reimbursement from the Fund for amounts paid in excess of the statutory limits.

By creating the Fund and this mechanism, Congress eliminated the need for concursus as to oil pollution claims. See 2 Thomas J. Schoenbaum, Admiralty and Maritime Law Sec. 18-2 at 385 (Practitioner Treatise Series, 2d ed. 1994) ("Since there is no concursus [under the OPA]

such as is available under the Limitation Act, transfer and consolidation of the various suits in a single forum will be up to the discretion of the court.") As the Eleventh Circuit points out, there is no allegation that the claims in this case pose any danger of exceeding the $1 billion cap on claims. *Bouchard,* 147 F.3d at 1350 n. 8.

Applying Supplemental Rule F to OPA would also violate the Rules Enabling Act, 28 U.S.C. Sec. 2072. Congress plainly did not intend claimants under OPA to be subjected to the Limitation Act or pro rata distribution of available funds. The Senate Report characterized the Limitation Act as a "potentially devastating bar" to effective recovery of either cleanup costs or damages. Senate Report on P.L. 101-380, S. Rep. No. 94, 101st Cong. 2d sess. 4 (1990), reprinted in 1990 U.S.C.C.A.N. 722, 725.

As a rule of civil procedure, Supplemental Rule F cannot be applied in any way that would impair or abridge substantive rights created by Congress. *Douglas v. NCNB Texas National Bank,* 979 F.2d 1128, 1130 (5th Cir.), *cert. denied, Douglas v. FDIC,* sub nom. 510 U.S. 817, (1993). Instead of providing claimants with full recovery for damages sustained by them as the result of an oil spill, the Supplemental Rule F procedure would subject them to concursus, under which their recovery would be diminished. If the vessel owners' argument were to be accepted, it would abridge substantive rights created by Congress "in the guise of regulating procedure." *Sibbach v. Wilson & Co.,* 312 U.S. 1, 10 (1941).

Application of Supplemental Rule F would conflict with OPA in other ways as well. Under OPA, the state and federal courts have concurrent jurisdiction over OPA

claims. Because Supplemental Rule F is a rule of federal civil procedure, either it would vitiate the concurrent jurisdiction of the state courts or it would have no application to cases brought in state court. In addition, application of Supplemental Rule F would drastically reduce the generous limitations period provided by OPA for bringing claims against the responsible party and would restrict the venue provisions of OPA. *Bouchard*, 147 F.3d at 1350-51.

The Eleventh Circuit properly concluded that "Rule F is designed to distribute a limited fund to multiple claimants where Congress has provided no statutory procedure for that distribution and where all claims cannot be paid in full. This case satisfies neither of these requirements – Congress has provided a procedure for implementing OPA and the Fund will guarantee full payment of all valid OPA 90 claims arising from this oil discharge." *Bouchard*, 147 F.3d at 1352. The Petitioners have advanced no cogent reason why the Supreme Court review of this ruling is necessary.

3. This Court Should Not Create A Rule To Fix A Non-Existent Problem

Petitioners ask this Court to exercise its legislative powers to create procedural rules for the implementation of OPA 90. In support of this farfetched argument, Petitioners allude to the fact that 127 years ago, the Supreme Court created the precursor of Supplemental Rule F in order to fill a procedural vacuum needed to implement the Limitation of Liability Act. The Court should decline the Petitioners' invitation because, as the Eleventh Circuit held, Congress has specifically set forth procedures to implement OPA.

Petitioners argue that this Court has broad authority in admiralty and maritime matters under Article III, Sec. 2 of the United States Constitution. However, there is no reason for this Court to engage in rulemaking where Congress has enacted comprehensive legislation on the subject and when the issues raised by the vessel owners appear to be of purely hypothetical concern. While the Petitioners articulate numerous reasons why concursus would be desirable in OPA cases, these arguments are properly addressed to Congress and not to the judicial branch.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: November 24, 1998

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Nos. 98-682 and 98-752

In the Supreme Court of the United States

OCTOBER TERM, 1998

BOUCHARD TRANSPORTATION COMPANY, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

DEPARTMENT OF ENVIRONMENTAL PROTECTION OF
FLORIDA, PETITIONER

v.

BOUCHARD TRANSPORTATION COMPANY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the concursus procedure under Rule F of the Supplemental Rules For Certain Admiralty and Maritime Claims applies to claims brought under the Oil Pollution Act of 1990, 33 U.S.C. 2701 *et seq.* (1994 & Supp. II 1996).

2. Whether a federal court retains jurisdiction notwithstanding a State's invocation of the Eleventh Amendment when the State files claims in an action brought under the Limitation of Shipowner's Liability Act of 1851, 46 U.S.C. App. 181-196 (1994 & Supp. II 1996).

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-682

BOUCHARD TRANSPORTATION COMPANY, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

No. 98-752

DEPARTMENT OF ENVIRONMENTAL PROTECTION OF FLORIDA, PETITIONER

v.

BOUCHARD TRANSPORTATION COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20[1]) is reported at 147 F.3d 1344. The order of the district court (Pet. App. 21-24) is unreported.

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[1] All references to "Pet. App." herein refer to the Appendix to the petition filed in No. 98-682, unless otherwise noted.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1998. The petition for a writ of certiorari in No. 98-682 was filed on October 26, 1998. The petition for a writ of certiorari in No. 98-752 was filed on October 28, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Limitation of Shipowner's Liability Act of 1851 (Limitation Act), 46 U.S.C. App. 181-196 (1994 & Supp. II 1996), allows a shipowner to limit his or her liability with respect to claims arising out of a vessel casualty, not involving death or personal injury, to the post-accident value of the ship plus "her freight then pending." 46 U.S.C. App. 183(a). Paragraph (1) of Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims (Rule F) provides that, within six months of receiving a claim in writing, "any vessel owner may file a complaint in the appropriate district court, as provided in subdivision (9) of this rule, for limitation of liability pursuant to statute." Paragraph (2) of Rule F provides that "[t]he complaint shall set forth the facts on the basis of which the right to limit liability is asserted and all facts necessary to enable the court to determine the amount to which the owner's liability shall be limited."

If the vessel owner complies with the requirements for timely filing of a complaint, "all claims and proceedings against the owner or the owner's property with respect to the matter in question shall cease." Rule F(3). The court then has the authority to issue notice to all claimants with respect to which the vessel owner seeks limitation of liability, Rule F(4), to require the filing of claims in a single consolidated procedure,

Rule F(5), and, upon determining the vessel owner's liability, to award pro rata shares to the claimants "in proportion to the amounts of their respective claims," Rule F(8). The procedure provides a "concursus" of all claims against the vessel owner arising out of claims consistent with limitations on vessel owner liability provided by statute.

b. In 1990, Congress enacted the Oil Pollution Act (OPA), 33 U.S.C. 2701 *et seq.* (1994 & Supp. II 1996). That legislation followed the catastrophic marine and environmental disaster involving the *Exxon Valdez*, which accidentally discharged more than 11 million gallons of crude oil into Prince William Sound, Alaska. The OPA provides a comprehensive liability scheme for oil spills, applying to cases arising from such accidents, "[n]otwithstanding any other provision or rule of law." 33 U.S.C. 2702(a). Under the OPA, "each responsible party for a vessel or a facility from which oil is discharged * * * is liable for the removal costs and damages." 33 U.S.C. 2702(a). Included in the definition of "responsible party" are vessel owners, operators, and demise charterers. 33 U.S.C. 2701(32)(A).

In addition to changing the parties liable for oil spill damages, the OPA also abandons the Limitation Act's value-of-the-vessel-plus-pending-freight liability formula. "[T]he OPA contemplates a strict liability regime with statutory limits of at least $2 million for tanks vessels and $.5 million for all other vessels. 33 U.S.C. §§ 2702, 2704. Moreover, in certain instances, the OPA imposes virtually unlimited liability on the responsible party. *See* 33 U.S.C. § 2704(c)." *In re Metlife Capital Corp.*, 132 F.3d 818, 822 (1st Cir. 1997), cert. denied, 118 S. Ct. 2367 (1998). Moreover, the OPA liability provisions do not affect the imposition of addi-

tional liability under "State law, including common law." 33 U.S.C. 2718(a)(2).

2. This litigation arises from a collision between a freighter and two tugs in Tampa Bay on August 10, 1993. Pet. App. 4. In the aftermath of the collision, the owners of the three vessels filed petitions under the Limitation Act, 46 U.S.C. App. 183(a). The vessel owners sought exoneration from, or limitation of, liability for damages caused by the collision. Pet. App. 4-6. The district court issued injunctions pursuant to the "concursus" procedure of Rule F and consolidated the three limitations actions with four other cases arising out of the collision. Pet. App. 7.

With all of its claims cognizable in an action brought under the OPA, the United States filed protective claims in these Limitation Act proceedings initiated by the vessel-owner petitioners and then moved to dismiss, without prejudice, on the ground that its OPA claims could be asserted independently of the Limitation Act/Rule F proceedings. The district court granted that motion. Pet. App. 22.

Petitioner Department of Environmental Protection of Florida (Florida) moved to dismiss on the ground that the district court lacked jurisdiction, in light of the Eleventh Amendment, to adjudicate the State's rights arising from the accident. The district court granted that motion. Pet. App. 22-23.[2]

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[2] Initially, the district court had ordered the parties, including Florida, to engage in mediation. The Eleventh Circuit reversed that ruling, however, and remanded the case to the district court for a prompt ruling on Florida's claim of Eleventh Amendment immunity. See *Bouchard Transp. Co.* v. *Florida Dep't of Envtl. Protection*, 91 F.3d 1445, 1448-1449 (11th Cir. 1996).

3. The court of appeals affirmed in part, reversed in part, and remanded for additional proceedings. Pet. App. 19-20. The court first addressed the State's claim of immunity under the Eleventh Amendment. See *id.* at 9-11. The court analogized a Limitation Act proceeding to an admiralty *in rem* action, in which the court has jurisdiction over the res and claimants file claims to it: "Like an in rem proceeding, the plaintiffs in the limitation proceeding neither named any specific entities as defendants in their complaints nor formally served process on any defendants." *Id.* at 10. Rather, "the plaintiffs posted security bonds with the district court in the amount of their maximum liability and the district court notified potential claimants to make their claims on the res deposited with the district court." *Id.* at 11. Invoking *California* v. *Deep Sea Research, Inc.*, 118 S. Ct. 1464 (1998), the court of appeals held that Florida's Eleventh Amendment immunity did not apply in this Limitation Act case because the suit is "sufficiently analogous" to an *in rem* proceeding. Pet. App. 10-11.

The court of appeals then addressed whether Rule F concursus procedures apply to claims brought pursuant to OPA. The court gave two reasons for holding that OPA claims are not subject to Rule F concursus: "(1) OPA 90 claimants do not face a limited fund necessitating a pro rata distribution; and (2) Congress has specifically set forth procedures to implement the strictures of OPA 90." Pet. App. 12. The court concluded that, in cases involving maritime oil spills, Congress intended for OPA to override the Limitation Act's liability provisions and to accomplish the statutory aim of establishing liability for oil spill removal costs "without the assistance of Rule F." *Id.* at 14.

ARGUMENT

The decision of the court of appeals is correct with respect to both its Rule F and Eleventh Amendment holdings, and does not conflict with any decision of this Court or any court of appeals. Accordingly, further review is unwarranted.

1. The vessel-owner petitioners (No. 98-682) contend that, even with respect to claims that are not cognizable under the Limitation Act, the procedural requirements of Rule F (or some new concursus rule to be created by this Court) should be applied to this case. That argument is incorrect.

The Limitation Act allows a vessel owner to limit his or her liability with respect to claims arising out of a vessel casualty, not involving death or personal injury, to the post-accident value of the ship plus "her freight then pending." 46 U.S.C. App. 183(a). Congress, however, has prescribed a different scheme for liability in those maritime accidents causing the discharge of crude oil or refined petroleum products; that more specific statutory scheme supersedes the Limitation Act with respect to this class of cases. See *In re Metlife Capital Corp.*, *supra*.[3] The vessel-owner petitioners, in fact, do not challenge the premise that the substantive scheme of liability set forth in the Limitation Act does not apply to this litigation.

Rule F was adopted to implement the Limitation Act. Even though the substantive liability provisions of the

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[3] The courts of appeals have reached similar conclusions on the interplay between the Limitation Act and the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.*, *In re Oswego Barge Corp.*, 664 F.2d 327, 340 (2d Cir. 1981), and the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. 1651 *et seq.*, *In re Glacier Bay*, 944 F.2d 577, 583 (9th Cir. 1991).

Limitation Act do not apply here, petitioners nevertheless seek to impose the Rule F "concursus" procedure on this OPA case. That proposition lacks merit. As the court of appeals concluded, Congress has expressly provided procedures for OPA litigation and those procedures are incompatible with Rule F. Pet. App. 14-15. See also *In re Metlife*, 132 F.3d at 823-824.

Petitioners (No. 98-682 Pet. 12) express concern that there "may" not be sufficient means to protect them from incurring liability that exceeds the limits set forth in the OPA. Parties in OPA litigation, however, may invoke the same procedures generally available to litigants in the federal court system: consolidation under Federal Rule of Civil Procedure 42; transfer for *forum non conveniens* under 28 U.S.C. 1404(a); and multidistrict litigation under 28 U.S.C. 1407. Speculation that those traditional tools will prove to be inadequate is premature and does not provide any basis for further review.[4]

2. Petitioner Department of Environmental Protection of Florida (No. 98-752 Pet. 6-9) contends that the Eleventh Amendment obviates the need for a State to participate in a Limitation Act proceeding that will adjudicate the claims of liability of the vessel owner, upon pain of forfeiting that State's claims. The court of

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[4] Moreover, the vessel owners' fears are even more speculative than they acknowledge. The vessel-owner petitioners' argument is based on the untested assumption that they are protected by the OPA's dollar-per-ton liability limits under 33 U.S.C. 2704(a)(1) (1994 & Supp. II 1996). The OPA's liability limits are not always available to a responsible party and, in this litigation, the government maintains that none of the vessel-owner petitioners qualifies for the OPA limitation due to their alleged violations of federal safety rules. See 33 U.S.C. 2704(c)(1)(B). That question has not yet been addressed by the district court.

appeals correctly rejected that argument. For purposes of the Eleventh Amendment claim being asserted by the State, there is no material difference between a Limitation Act proceeding that determines various claimants' interests in liability apportionment and an *in rem* proceeding that determines claimants' ownership interests. Both types of disputes involve invocations of federal admiralty jurisdiction. Like an *in rem* proceeding, the Limitation Act action seeks no property or funds that are in the State's possession; rather, the vessel owner seeks a declaration from the court limiting or exonerating it from liability. The policies favoring unitary admiralty jurisdiction, see *Deep Sea Research*, 118 S. Ct. at 1470, are equally present in the Limitation Act context and the putative threat to a State's Eleventh Amendment immunity is equally absent. Although the Limitation Act has been on the books for nearly a century and a half, this apparently is the first time a court of appeals has confronted an Eleventh Amendment challenge by a State to the concursus procedure. See No. 98-752 Pet. 9; Pet. App. 9 n.3.

3. In addition, Petitioner Department of Environmental Protection of Florida (98-752 Pet. 9-11) argues that the vessel owners' pursuit of counterclaims against the State is barred under the Eleventh Amendment. That claim, however, was not passed on by the court of appeals. The court of appeals' silence on the issue may have stemmed from the State's failure to specify its arguments regarding the counterclaims as a separate

issue.[5] Florida could have sought rehearing in the court of appeals, bringing that possibly overlooked argument to the court's attention, but it did not. See Fed. R. App. P. 40. Nor does the State offer any conflicting decision by any other court on the issue. Accordingly, even if the court erred in having failed to consider separately the Eleventh Amendment implications of counterclaims brought against the State in a concursus proceeding, this case would not be a suitable vehicle for considering that issue.

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[5] The Statement of the Issues in Florida's brief as appellee (filed in 11th Cir., Nos. 96-3494, et al., at 12) framed the issues as follows:

> I. Whether the Eleventh Amendment immunity of a State from suit in federal court applies in the context of an admiralty limitation of liability proceeding.
>
> II. Whether vessel owners may use the admiralty limitation of liability procedures of Supplemental Rule F to circumvent the Oil Pollution Act of 1990 with regard to claims arising out of an oil spill in Florida waters.
>
> III. Whether the injunctions against prosecution of claims against the vessel owners and their vessels outside of the limitation cases should be enforced even if the use of Supplemental Rule F is limited.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1998

BOUCHARD TRANSPORTATION COMPANY, INC.;
TSACABA SHIPPING COMPANY, INC.;
MARITRANS OPERATING PARTNERS L.P., *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURAE* OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

The Maritime Law Association of the United States (MLA) respectfully moves for leave to file the attached Brief *Amicus Curiae* in Support of Bouchard Transportation Company, Inc.; Tsacaba Shipping Company, Inc.; Maritrans Operating Partners L.P., Petition for Writ of Certiorari (the "Brief").

The MLA has obtained the consent of counsel for the Petitioners to file its Brief. The MLA has also received the consent of the following parties: The United States, The State of Florida, Marshall Ancar, Evangelisto Anaya, Jr., Robert Hopkins, Michael L. Panagakos, Harry P. Scholer, Continental Insurance Company, Excel Hotels, Inc., Edward P. Rush.

Consent has been denied by counsel for Boca Ciega Hotel, et al. and Ramona M. Updegraff, et al.

NATURE OF MOVANT'S INTEREST

The MLA is a nationwide bar association founded in 1899, with a membership of about 3,600 attorneys, law professors, and others interested in maritime law. Its attorney members, most of whom are specialists in admiralty law, represent all maritime interests – shipowners, charterers, cargo interests, port authorities, seamen, longshoremen, passengers, underwriters, and other maritime claimants and defendants. The MLA has filed *amicus*

briefs in a number of cases in this Court involving questions of maritime law and practice.[1]

The MLA is seeking to file an *amicus* brief because this case has serious implications for the maritime transportation and maritime insurance industries. The decisions of the courts below, despite the unequivocal grant of the right to limitation of liability contained in § 2704 of the Oil Pollution Act of 1990, have made it almost impossible for shipowners to invoke the right granted by the statute. The MLA has adopted the position that a *concursus* procedure, that is, a marshaling of all claims against a shipowner arising from a single incident, is an essential feature of a limitation of liability regime and that a *concursus* is indispensable in implementing limitation of liability under the Oil Pollution Act of 1990. The long-standing and wide-spread experience of the MLA in matters regarding limitation of liability, a process virtually unique to maritime law, should enable it to present important insights in the resolution of the issues raised in the Petition for Certiorari.

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[1] *E.g.*, Vimar Seguros y Reaseguros, S.A. v. M/V SKY REEFER, 515 U.S.528, 115 S. Ct. 2322 (1995); Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 115 S. Ct. 1043 (1995); McDermott, Inc. v. AmClyde and River Don Castings Ltd., 511 U.S. 202, 114 S. Ct. 1461 (1994). For a listing of other cases, see The MLA Report, Doc. No. 671 at 8862-63 (1987).

The MLA, therefore, respectfully moves for leave to file its brief herein.

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November 23, 1998

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BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, *AMICUS CURIAE*, IN SUPPORT OF PETITIONERS

The Maritime Law Association of the United States (hereinafter "MLA") respectfully submits this Brief[1] as *amicus curiae* in support of the Petition for Writ of Certiorari filed by Bouchard Transportation Company, Inc.; Tsacaba Shipping Company, Inc.; Maritrans Operating Partners L.P., *et al.* ("Petitioners").

INTEREST OF *AMICUS CURIAE*

The MLA is a nationwide bar association founded in 1899, with a membership of about 3,600 attorneys, judges, law professors, and others interested in maritime law. Its attorney members, most of whom are specialists in admiralty law, represent all maritime interests, including shipowners, charterers, cargo interests, port authorities, seamen, longshoremen, passengers, underwriters, and other maritime claimants and defendants.

The purposes of the MLA are stated in its Articles of Association:

> The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment

[1] In conformity with Supreme Court Rule 37.6, *amicus curiae* states that no part of this Brief was authored by counsel for a party nor did any person or entity other than *amicus curiae* make any monetary contribution to the preparation or submission of this Brief.

> and interpretation, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comite Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices in different nations.

In furtherance of these objectives, the MLA has sponsored a wide-range of legislation dealing with maritime matters during its 99 years of existence, including the Carriage of Goods by Sea Act,[2] the Federal Arbitration Act,[3] and the Foreign Sovereign Immunities Act.[4] The MLA has also cooperated with congressional committees in the formulation of other maritime legislation.[5]

Specifically, with regard to the issues presented in the Petition for Certiorari, the MLA has adopted the position that *concursus* is an essential feature of a limitation of liability regime and that *concursus* is necessary in

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[2] 46 U.S.C. App. §§ 1300-1315.

[3] 9 U.S.C. §§ 1-5.

[4] 28 U.S.C. §§ 1330, 1602-1611.

[5] *E.g.*, Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1376; Convention on the International Regulations for Prevent Collisions at Sea, 28 U.S.T. 3459, as amended, T.I.A.S. 10672, Oct. 20, 1972, *reprinted in* 6 BENEDICT ON ADMIRALTY, Doc. No. 3-4 (Frank L. Wiswall, Jr. Ed., 7th ed. rev. 1998); *see* 33 C.F.R Ch. 1, Subch. D. Special Note, at 176 (1995); United States Inland Navigation Rules, 33 U.S.C: §§ 2001-2073.

implementing limitation of liability under the Oil Pollution Act of 1990.

SUMMARY OF ARGUMENT

The holding of the lower courts has seriously undermined, if not defeated, the right of shipowners to limit their liability under the Oil Pollution Act of 1990 (OPA 90). The lower courts held that shipowners have no right to compel a *concursus* of claims when invoking their right to limited liability under OPA 90. *Concursus* of claims, that is, the marshalling of all claims against a shipowner who has petitioned for limitation, is at the very heart of the right to limitation of liability. In effect, the lower courts have held that there is no procedure for invoking the right to limited liability, notwithstanding that OPA (33 U.S.C. § 2704) specifically confers on shipowners the right to limit their liability.

The decisions of the courts below will have far reaching implications on the oil, maritime shipping and marine insurance industries, because, in the absence of procedures for invoking the right to limit, including the indispensable *concursus* procedure, shipowners face the prospect of unlimited liability. The current situation is similar to that which existed after the enactment of the general Limitation of Liability Act of 1851 (now codified in 46 U.S.C. App. § 183) which gave shipowners the right to limited liability but provided no procedures for implementing the right. This Court, rather than see congressional policy frustrated, formulated procedures, including the right to *concursus*, which made limitation of

liability possible. To effectuate the right to limited liability which Congress conferred in OPA 90, Amicus urges the Court to establish uniform rules of procedure which include a *concursus* proceeding. The absence of uniform procedures will result in the negation of the right to limit, unfairness to shipowners and, in some cases unfairness to claimants, and procedural chaos in the aftermath of oil spills.

ARGUMENT

I. The issues presented to this Court implicate important national and international interests which require a definitive resolution by this Court.

The issues presented in the Petition have far reaching national and international ramifications that implicate the interests of the oil industry, the oil transportation industry, the maritime shipping industry and the marine insurance industry. The foregoing statement is not rhetoric. Petroleum is this country's largest import.[6] In 1997 alone, 3.8 billion barrels of energy related petroleum products were imported, at a value of 69.2 billion dollars.[7] Net oil imports are projected to increase to 11.4 million barrels

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[6] Michael S. Leylveld, *America Ignores Oil Dependency as Reliance on Imports Grows*, JOURNAL OF COMMERCE, Aug. 14, 1998, ‹http://www.joc.com/archive/980814/JC00055.html›.

[7] FOREIGN TRADE DIVISION, BUREAU OF THE CENSUS, REPORT FT 900 (97) (CB-98-104), (1997) ‹http://www.census.gov/foreign-trade/Press-Release/97-press_releases/Final_Revis . . . /exh16.tx›.

per day by the year 2005.[8] In addition, more than 3,300 tankers, each with a capacity of greater than 10,000 deadweight tons, now serve the world maritime oil trade. Approximately 40 percent of these vessels call each year at U.S. ports.[9]

The Oil Pollution Act of 1990 (hereinafter "OPA 90") applies not only to tankers but also to non-tank vessels that carry oil as fuel. Therefore, virtually every commercial vessel entering U.S. ports or plying U.S. waters is subject to OPA 90, including the OPA 90 liability provisions. OPA 90 requires all vessels with oil on board, either as cargo or fuel, to guarantee that they have the financial wherewithal to pay for removal costs and damages in case of a discharge. Many shipping companies satisfy this requirement by purchasing insurance.

Shipping companies and their insurers have expressed legitimate concern about limitation of liability under OPA 90 and the procedures whereby limitation is to be effected.[10] For them the issue is a simple one: Is there limitation of liability under OPA 90 or not? In reality, this is the issue presented to this Court by the Petition for Certiorari. Amicus agrees with Petitioners'

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[8] ENERGY INFORMATION ADMINISTRATION, DEPARTMENT OF ENERGY, ANNUAL ENERGY OUTLOOK (1996).

[9] REPORT OF THE NATIONAL RESEARCH COUNCIL, DOUBLE-HULL TANKER LEGISLATION: AN ASSESSMENT OF THE OIL POLLUTION ACT OF 1990, at v (1997).

[10] R. Force & J. Gutoff, *Limitation of Liability in Oil Pollution Cases: In Search of Concursus or Procedural Alternatives to Concursus*, 22 TUL. MAR. L.J. 331, 344 n. 36 (1998).

contention that *concursus* lies at the heart of the right to limited liability and that without *concursus* the right to limit may be illusory. The resolution of this issue will have ramifications that extend far beyond this spill. Because the United States imports such gargantuan quantities of oil, the extent of liability of the vessels that bring oil to this country may have a significant impact on the international industries that supply oil to the United States. The issues clearly are not only capable of repetition, they are bound to reoccur. The holding of the courts below establish a rule that applies to all discharges of oil from the smallest to the largest, including incidents such as the Exxon Valdez spill (a pre-OPA 90 spill), which involved expenditures by Exxon said to exceed three billion dollars.

II. The decision of the Court of Appeals is directly contrary to the provisions of OPA 90, specifically 33 U.S.C. § 2704, whereby Congress conferred on shipowners the right to limited liability. The right to limited liability is unenforceable without a *concursus* procedure.

Unless this Court reverses the decision of the Court of Appeals that there is no right to *concursus* in limitation proceedings under OPA 90, the decision by Congress to give vessel owners the right to limit their liability will be thwarted. Section 2704 of OPA 90 (33 U.S.C. § 2704)

unequivocally provides for the right to limited liability.[11] However, OPA 90 is silent with regard to the procedural

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[11] § 2704. Limits on liability

(a) General rule

Except as otherwise provided in this section, the total of the liability of a responsible party under section 2702 of this title and any removal costs incurred by, or on behalf of, the responsible party, with respect to each incident shall not exceed –

(1) for a tank vessel, the greater of –

(A) $1,200 per gross ton; or

(B)(i) in the case of a vessel greater than 3,000 gross tons, $10,000,000; or

(ii) in the case of a vessel of 3,000 gross tons or less, $2,000,000;

(2) for any other vessel, $600 per gross ton or $500,000, whichever is greater;

(3) for an offshore facility except a deepwater port, the total of all removal costs plus $75,000,000; and

(4) for any onshore facility and a deepwater port, $350,000,000.

* * *

(c) Exceptions

(1) Acts of responsible party

Subsection (a) of this section does not apply if the incident was proximately caused by –

(A) gross negligence or willful misconduct of, or

(B) the violation of an applicable Federal safety, construction, or operating regulation by, the responsible party, an agent or employee of the responsible party, or a person acting pursuant to a contractual relationship with the responsible party

implementation of this right. It is the position of Amicus that the right of limitation provided for in OPA 90 is illusory without a *concursus* procedure that allows for the assertion and enforcement of the right of limitation.

(except where the sole contractual arrangement arises in connection with carriage by a common carrier by rail).

(2) Failure or refusal of responsible party

Subsection (a) of this section does not apply if the responsible party fails or refuses –

(A) to report the incident as required by law and the responsible party knows or has reason to know of the incident;

(B) to provide all reasonable cooperation and assistance requested by a responsible official in connection with removal activities; or

(C) without sufficient cause, to comply with an order issued under subsection (c) or (e) of section 1321 of this title, as amended by this Act, or the Intervention on the High Seas Act (33 U.S.C. 1471 et seq.).

(3) OCS facility or vessel

Notwithstanding the limitations established under subsection (a) of this section and the defenses of section 2703 of this title, all removal costs incurred by the United States Government or any State or local official or agency in connection with a discharge or substantial threat of a discharge of oil from any Outer Continental Shelf facility or a vessel carrying oil as cargo from such a facility shall be borne by the owner or operator of such facility or vessel.

* * *

In *Norwich Co. v. Wright*,[12] this Court created procedures to implement the Limitation of Liability Act of 1851[13] rather than have the Congressional policy underlying that Act frustrated by a lack of procedures. That Act conferred on vessel owners the right to seek "limited liability" in maritime cases. This Court should follow that precedent either by applying Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims of Rules of Civil Procedure (hereinafter "Supplemental Rules") or by creating analogous procedures compatible with 33 U.S.C. § 2704, the limitation section of OPA 90.

The courts below[14] were unwilling to recognize that legislation providing for limitation of shipowners' liability, both in the Limitation of Liability Act of 1851 and in § 2704 of OPA 90, was intended to benefit shipowners and not those who have claims against shipowners. As this Court stated in *The Scotland*:

> But it is objected that the appellants [Shipowners] did not properly, and in due time, claim the benefit of the law. Under this head it is strenuously contended that the appellants did not comply with the rules of this court adopted in December Term, 1871. Without adverting to the fact that these rules were not in existence until long after this litigation had been pending, we may say, once for all, that they were not intended to restrict parties claiming the benefit

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[12] Norwich & N.Y. Transp. Co. v. Wright, 80 U.S. 104 (1871).

[13] Now codified at 46 U.S.C. App. § 185.

[14] Bouchard Transp. Co., Inc. v. Updegraff, 147 F.3d 1344, 1350 (11th Cir. 1998), petition for cert. filed, ___ U.S.L.W. ___ (U.S. No. 98-682, 1998).

> of the law, but to aid them. *Some form of proceeding was necessary to enable ship-owners to bring into concourse the various parties claiming damages against them for injuries sustained by mishaps to the ship or cargo, where they were entitled, or conceived themselves entitled, to the law of limited responsibility, and where they were subjected or liable to actions for damages at the suit of the parties thus injured. The rules referred to were adopted for the purpose of formulating a proceeding that would give full protection to the ship-owners in such a case.*[15] [emphasis added]

Although a *concursus* procedure may afford claimants a more equitable opportunity to share in a limitation fund that is inadequate to satisfy all claims, the *concursus* procedure is intended primarily to assure that a shipowner's liability does not exceed the legislatively mandated limit. In other words, *concursus* prevents limited liability from being defeated through multiple law suits, which might be brought in a number of different courts.

The courts below further undermined § 2704 of OPA 90 by concluding that limitation of liability in OPA 90 was not really a limitation of liability provision because all claimants could recover their full damages from the Oil Spill Liability Trust Fund.[16] However, it can also be said that limited liability under the Limitation Act of 1851 does not truly provide for limited liability because claimants may recover their full damages from third parties

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[15] *The Scotland*, 105 U.S. 24, 33 (1881).

[16] *Bouchard*, 147 F.3d at 1350.

who are not protected by the limitation statute. Limitation of liability must be looked at not from the perspective of claimants, but from the perspective of shipowners who are the intended beneficiaries of the limitation legislation. It is of no concern that claimants may have other avenues of redress. The crucial issue is whether shipowners' liability, in reality, is limited to the amounts specified in § 2704, not whether claimants may recover in full from third parties, such as the Fund. Furthermore, the conclusion reached by the lower courts may not reflect the realities of some situations. For example, often the largest claimant in an oil spill case is the United States. While it is true that agencies of the United States may present claims to the Fund, as a practical matter, recovery from the Fund is nothing more than taking money out of one Governmental pocket and putting it into another Governmental pocket. In other words, the Government is simply collecting removal costs or damages from itself. With respect to the public fisc, if the United States does not recover from the responsible party or its guarantor, in actuality, it will not be reimbursed for its removal expenditures or compensated for its damages. Likewise, there is some question as to whether state trustees may recover from the Fund for natural resource damage.[17]

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[17] *Compare* Payments Authorized Under Section 1012 of the Oil Pollution Act of 1990, 21 Op. Off. Legal Counsel – (Sept. 25, 1997) *with* Matter of U.S. Coast Guard – Oil Spill Liability Trust Fund, 1995 WL 632510 (C.G.) (Oct. 30, 1995). Although the matter may have been resolved within the Executive Branch, neither Congress nor the courts have weighed in on this issue.

Additionally, as the Court of Appeals acknowledged, recovery against the Fund is limited to one billion dollars per incident, and, therefore, the liability of the Fund is not unlimited. The fact that recovery against the Fund is limited was dismissed by the Court of Appeals because there had been no suggestion that costs and damages in the incident in question would exceed that amount. This is not the issue the Court of Appeals should have addressed. The more cogent issue to be addressed is whether or not all of the claims that have been or might be filed against Petitioners in this case may, in the absence of some procedure such as *concursus*, result in liability in excess of the limits established in § 2704.

Either OPA 90 provides true limitation of liability for shipowners or it does not. Either *concursus* is a necessary ingredient of limitation of liability or it is not. As suggested below, there must be uniform procedures to assure that shipowners' right to limit can be effectuated. The holding of the Court of Appeals is not fact specific. It does not hold simply that there is no need for *concursus* in this case, but that there is no need for *concursus* in any case under OPA 90 in which the right of limitation is implicated.[18] The decision also overlooks the fact that

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[18] Admittedly, under the Limitation Act of 1851 and Supplemental Rule F, the courts have recognized some exceptions to the *concursus* requirement in situations where it is clear that the shipowner's liability cannot exceed the limitation amount. There may also be exceptions under OPA 90. That issue, however, is not before this Court.

removal costs and damages which emanate from the discharge of oil in some cases may exceed one billion dollars. This is not idle speculation. The Exxon Valdez spill cost Exxon in excess of three billion dollars.

The opinion of the Court of Appeals has to some extent deleted § 2704 from OPA 90 because OPA 90 contains absolutely no procedures for effecting limitation of liability. OPA 90 creates substantive rights to recover removal costs and damages and provides some procedures for claimants to implement those rights. OPA 90 creates a Fund and provides procedures whereby claimants may submit claims to the Fund. OPA 90 also creates the right of shipowners to limited liability. The creation of the right to limited liability represents a Congressional determination that shipowners shall not be exposed to unlimited liability except as specifically provided in the Act. But OPA 90, in contrast to providing procedures for asserting claims against responsible parties and the Fund, contains no procedure whereby shipowners may invoke the right to limited liability as specified in the Act. How do shipowners claim the right to limited liability? What procedures in OPA 90 protect vessel owners from being held liable in amounts that exceed the limitation amount provided in the Act? There are none. If a shipowner is subjected to two lawsuits in different courts arising from the same incident, and in each it is held liable up the limitation amount provided in § 2704, the shipowner will have been subjected to liability that is twice the amount established by Congress in § 2704 of OPA 90. Ultimately, a single court must be empowered to implement the limitation rights provided by OPA 90.

The Court of Appeals supported its conclusion by adopting the approach followed in *In re Metlife Capital Corp.*,[19] which found fundamental "conflicts" between the provisions of OPA 90 and the procedures in Supplemental Rule F. As Professors Force & Gutoff have demonstrated in discussing the *In re Metlife Capital Corp.* case, those "conflicts" are no different than those that presently exist under the Limitation Act of 1851 and the various claims subject to limitation thereunder.[20] They state:

> Many of the justifications for the court's conclusion simply do not bear scrutiny. Contrary to the suggestion of the court, Rule F requires that the person filing a limitation petition must do so within six months of having received notice of a claim. The Rule then leaves it to the discretion of the limitation court to set the time in which claims may be made against the limitation fund. There is absolutely no reason why a court would not take into account the time needed to complete removal activities or to formulate and implement a plan for restoration of natural resources. Likewise, the Oil Spill Liability Trust Fund could file a contingent claim in any situation where it appears that it may have a right to do so. The importance of the only time limit specified in Rule F is that it would require a responsible party to act promptly to invoke the right of limitation. It in no way impinges on

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[19] 132 F.3d 818, 1998 A.M.C. 635 (1st Cir. 1997) (*The Emily S*), *cert. denied by* Bunker Group, Inc. v. U.S., 118 S. Ct. 2367, 141 L.Ed.2d 736 (1998).

[20] Force & Gutoff, *supra* note 9, at 363-64.

the discretion of the trial judge to allow claimants a fair and realistic opportunity to present and prove their claims.

The limitation period analysis would, if carried to its logical conclusion, completely eviscerate both Supplemental Rule F and the Limitation Act in non-OPA 90 cases. If the position of the court were valid, the Act of 1851, itself, would conflict with later legislation. Congress by statute has provided for a three year statute of limitations for personal injury claims. But personal injury claims are subject to limitation. Thus, there very well may be situations where a personal injury plaintiff may have to file a claim in a limitation proceeding prior to the expiration of the three years in order to assure a share in the distribution of the limitation fund. The same may be said as to COGSA claims where there is a one year limitation period. In the event of a collision that results in cargo damage and personal injury there is nothing to prevent a vessel owner from filing for limitation of liability two weeks after the incident. . . .

More significantly, virtually every claim for damages that may be brought as an admiralty claim in federal court may also be brought in a state court under the "saving to suitors" provision of 28 U.S.C § 1333. These claims are no different than OPA 90 claims where a party who has incurred removal costs or sustained damages may sue in federal or state court. But just as ordinary "admiralty" claims brought in state court are subject to the exclusive jurisdiction of a federal *limitation* court so could OPA 90 claims brought in state court be made subject to the

> exclusive jurisdiction of a federal *limitation* court. [Footnotes omitted]

The same analysis disposes of other so-called conflicts between OPA 90 and Supplemental Rule F. Whenever a ship owner invokes its right to limit, the limitation proceeding may have some effect on the usual procedural rules applicable to the underlying claims. This would be the case with respect to venue, etc. Furthermore, in the case at bar, the injunctions and motions entered in the district court accommodated the claims presentment provisions of OPA 90. The Appendix to the Petition for Certiorari reveals that district courts can easily tailor Supplemental Rule F to the provisions of OPA 90.

III. The decisions of the courts below undermine the goal of uniformity in maritime law and dilute or eviscerate the right of shipowners to limit their liability under OPA 90.

Uniformity in maritime law requires that a uniform procedure be applied in oil pollution cases, including *concursus* as the linchpin of limited liability. Congress made it clear that it was not removing oil pollution cases from the realm of maritime jurisdiction and maritime law.[21] This Court has consistently opted for uniformity in maritime law, particularly where congressional legislation is applicable.[22] Congress has determined that shipowners have the right to limited liability under OPA 90,

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[21] OPA § 2751(e). *See* 33 U.S.C. § 2751(e).

[22] *See, e.g.*, Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990); *cf.*, Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 210-11 (1996).

and it is urged upon this Court that the right should be enforced according to a uniform procedure. The holding of the Court of Appeals that there is no right to *concursus* under OPA 90 is premised on the assumption that Congress, by specifying the procedures for bringing "claims," omitted any reference to *concursus*. Although OPA 90 does not expressly provide for *concursus*, it is fair to assume that Congress was aware that *concursus* had become an indispensable ingredient for making limitation statutes work. If Congress had wanted to eliminate *concursus* in limitation proceedings under the Act, it could have said so.

As was the case in the Limitation Act of 1851, OPA 90 specifies no procedures for effecting limitation under the Act. Just as it was necessary for this Court to promulgate rules for uniform procedures to be applied in limitation proceedings under the Limitation Act of 1851, it is now necessary for this Court to establish uniform procedures to be applied to limitation proceedings under OPA 90. This could be done readily by the application of Supplemental Rule F. Failure to establish a uniform procedure whereby shipowners can invoke their right to limit their liability means not only that chaos will reign in the litigation that inevitably follows major spills, but that this free-for-all approach to litigation will undermine the right of limitation of liability. In cases where multiple claims are filed in multiple courts, the right to limitation created in § 2704 of OPA 90 may be compromised or even lost.

This Court has again and again taken the lead in establishing procedures to be used in admiralty cases, first in the promulgation of the Admiralty Rules and later through the promulgation of the Supplemental Rules. The

creation of these various uniform rules has had the effect not only of making the enforcement of rights viable, but also the creation of these uniform procedures has resulted in procedural reliability, predictability and stability. Furthermore, the application of a uniform rule, such as Supplemental Rule F, is essential to achieve fundamental fairness. Without such a procedure, shipowners may be treated unfairly by being subjected to liability in excess of the statutorily established limitation amount. Conversely, claimants who win the race to the courthouse may preclude subsequent claimants from recovery. A *concursus* procedure which provides notice to all claimants and gives all claimants an opportunity to present their claims in a single proceeding assures not only that shipowners will not be liable in excess of the limitation amount, but that all claimants will have a fair opportunity to share in the limitation fund.

CONCLUSION

This case has serious implications for all industries that are directly and indirectly involved in bringing oil to United States or otherwise involved in the transportation of oil in United States waters. Despite the unequivocal grant of the right to limited liability in OPA 90, the decisions of the lower courts have made it almost impossible for shipowners to invoke that right. The right to limited liability is dependent on the availability of procedures whereby the right can be effectuated. A key procedural component of the right to limitation of liability is a *concursus* of claims where the party seeking to limit its liability establishes a limitation fund according to

the formula specified by Congress which then is available to satisfy all claims arising from the incident in question. The lower courts have concluded that there are no such procedures available for limitation of liability under OPA 90. The absence of such procedures seriously damages the right to limitation of liability expressly created by the Act. This case provides this Court with a critical and unique opportunity to establish uniform procedures implementing the limitation of liability provisions of OPA 90, and therefore Petitioners' writ should be granted.

Respectfully submitted,

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November 23, 1998

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In The

Supreme Court of the United States

October Term, 1998

BOUCHARD TRANSPORTATION COMPANY, et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND *AMICUS CURIAE* OF THE AMERICAN WATERWAYS OPERATORS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF AMERICAN WATERWAYS OPERATORS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The American Waterways Operators ("AWO") respectfully moves for leave to file the attached Brief *Amicus Curiae* in Support of Petition for Writ of Certiorari (the "Brief"). AWO has obtained the consent of the counsel for the Petitioners to file its Brief.

INTEREST OF *AMICUS CURIAE*

AWO is a national association representing the inland and coastal tugboat, towboat and barge industry. AWO's more than 350 member companies include bulk commodities transporters, ship docking and harbor services operators, fueling, bunkering, and lightering services operators and shipyards. For over fifty years, AWO has worked to promote a better understanding of the unique nature of the domestic waterborne transportation industry and its safe and environmentally sound contribution to the U.S. economy.

The Court of Appeals for the Eleventh Circuit's decision in this case held that Supplemental Rule F applies only to claims subject to limitation under the Limitation of Liability Act of 1851 and does not apply to claims subject to limitation under the Oil Pollution Act of 1990 ("OPA 90"). AWO believes that the denial of the *concursus* procedure of Supplemental Rule F in essence prevents vessel owners from obtaining the protection of the limitation of liability provisions in OPA 90. Additionally, in

contrast to the basic principle of judicial economy, this ruling also forces vessel owners to litigate claims arising from a single incident or casualty in multiple suits and multiple jurisdictions, resulting in conflicting results as well as multiple damage awards, the total of which will exceed the OPA 90 limitation amount. AWO also believes that the Eleventh Circuit's ruling will create immediate and damaging consequences for both the American petroleum products transportation industry and the American petroleum products market.

For the foregoing reasons, AWO respectfully moves for leave to file its Brief herein.

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December 28, 1998

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BRIEF OF THE AMERICAN WATERWAYS OPERATORS, *AMICUS CURIAE*, IN SUPPORT OF PETITIONERS

The American Waterways Operators (hereinafter "AWO") respectfully submits this Brief[1] as *Amicus Curiae* in Support of the Petition for Writ of Certiorari filed by Bouchard Transportation Company, Inc.; Tsacaba Shipping Company, Inc.; Maritrans Operating Partners L.P., et al. ("Petitioners").

INTEREST OF THE AWO AS *AMICUS CURIAE*

AWO is a national association representing the inland and coastal tugboat, towboat and barge industry. AWO is comprised of more than 350 member companies, including bulk commodities transporters, ship docking and harbor services operators, fueling, bunkering, and lightering services operators and shipyards. For over fifty years, AWO has worked to promote a better understanding of the unique nature of the domestic waterborne transportation industry and its safe and environmentally sound contribution to the U.S. economy.

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[1] In conformity with Supreme Court Rule 37.6, *amicus curiae* states that no part of this Brief was authored by counsel for a party nor did any person or entity other than *amicus curiae* make any monetary contribution to the preparation or submission of this Brief.

A. The AWO represents a vital and responsible segment of the U.S. transportation industry.

The U.S. barge and towing industry is a diverse and vital segment of America's transportation system. Barges and towing vessels make nearly one million voyages annually from over 2,000 bulk cargo docks and terminals along the inland and coastal waterways. AWO members employ more than 33,000 people aboard 6,200 tugs and towboats and more than 30,000 barges. All told, our industry contributes more than $5 billion a year to the American economy. With operations along our nation's 25,194 miles of inland and intracoastal waterways, including the Atlantic, Pacific and Gulf coasts, our industry is diverse in terms of geographic areas served, the types of vessels operated, the range of cargoes carried, and the skills required to perform a given job.

Tug and barge transportation provides Americans with a cost-efficient and reliable means of moving the raw materials that fuel our national economy. Indeed, barges move fifteen percent of our nation's freight, and yet this service produces only two percent of the nation's total freight bill. The economic efficiency of barge transportation is matched by its energy efficiency, as barging is America's most energy efficient mode of surface transportation. One gallon of fuel will move a ton of cargo more than 500 miles by tug and barge.

The U.S. tug and barge industry is committed to providing its customers with transportation services that are not only efficient, reliable, and cost-effective, but as safe and environmentally sound as possible. In recent years, the industry has worked closely with the U.S.

Coast Guard to upgrade regulatory standards in such key areas as towing vessel operator qualifications and navigation equipment on towing vessels. Our commitment to safety and the environment is also demonstrated by industry-driven safety initiatives like the AWO Responsible Carrier Program, a code of safe practices for tug and barge companies, and the Coast Guard-AWO Safety Partnership, which brings our industry together with government to solve marine safety and environmental protection problems.

B. The civil liability of AWO members will be vastly enlarged under the Court of Appeals' ruling.

The Court of Appeals for the Eleventh Circuit's ruling in *Bouchard Transp. Co., Inc. v. Updegraff*, 147 F.3d 1344 (11th Cir. 1998), will have grave consequences, far reaching beyond the Tampa Bay oil spill or the individual parties in this case. The import of the Eleventh Circuit's ruling that claims under the Oil Pollution Act of 1990 ("OPA 90") are not subject to the *concursus* procedure of Supplemental Rule F cannot be overstated. If the Eleventh Circuit's ruling is allowed to stand and the procedural tool of *concursus* is precluded from use where claims arise under OPA 90, there will be no way to assure that vessel owner liability will not exceed the limitation specifically set by Congress. Put another way, the ruling of the Eleventh Circuit effectively prevents vessel owners from availing themselves of the limitation of liability provisions created by Congress in OPA 90. The practical effect of the Eleventh Circuit's ruling is that vessel owners must create, not one, but potentially several

funds in various jurisdictions for assorted and scattered claimants. The further result of the Eleventh Circuit's decision is that vessel owners (and the Courts) will be vulnerable to inconsistent verdicts, not only in regard to liability but also in regard to the issues of priority of claims and amount of limitation. Finally, vessel owners will now be required to defend the multitude of claims arising from a single pollution incident in numerous state courts and the Federal District Courts, wherever the owner is subject to personal jurisdiction. The Eleventh Circuit's holding, therefore, has the potential to impact drastically America's shipping industry because it essentially annuls OPA 90's defense of limitation of liability, while it encourages multiple proceedings in numerous jurisdictions. The decision below sentences vessel owners to perpetual litigation and inconsistent judicial rulings for OPA 90 claims arising out of one single incident. Accordingly, AWO respectfully urges this Court to review and then reverse the decision of the Eleventh Circuit.

THE ISSUE ON APPEAL OF CONCERN TO *AMICUS CURIAE*

The issue on appeal of concern to AWO is whether district Courts, in exercising their admiralty and maritime jurisdiction, should apply the *concursus* procedure of Supplemental Rule F to implement the limitation of liability provisions of OPA 90, which were granted to vessel owners by Congress.

SUMMARY OF AMICUS CURIAE ARGUMENT

The ruling of the Eleventh Circuit that Supplemental Rule F does not apply to claims brought under OPA 90 denies vessel owners the Congressionally granted limitation rights of the statute. Although Congress enacted OPA 90 in order to raise the limit of damages recoverable under the Limitation of Liability Act of 1851 (46 U.S.C. §§ 183, 185) (the "Limitation Act"), Congress was explicit and clear in its intention to continue in OPA 90 the long standing policy of a regime of limitation of liability. However, by denying vessel owners the use of Rule F and the *concursus* procedure for claim adjudication, the Eleventh Circuit effectively does away with the limitation provisions of OPA 90. The limitation provisions are a key feature of the OPA 90 scheme devised by Congress.

Without the procedural tool of Rule F, which mandates a marshaling of all claims against the vessel owners and the limitation fund, the Courts cannot guarantee that Congress' intention to limit the liability of vessel owners will be preserved. If claimants are allowed to pursue claims against a vessel owner in various jurisdictions, vessel owners will undoubtedly face inconsistent judgments and damages that far exceed the statutory limitation of liability. Additionally, by depriving the District Courts of their power to marshal claims for adjudication, the Eleventh Circuit creates a consequence of judicial inefficiency, as claims against one limited fund, arising from one set of facts, will be litigated in multiple suits in multiple jurisdictions.

Additionally, by allowing piecemeal and fractional litigation, the Eleventh Circuit has disregarded one of the

most essential goals of the judicial process: to compensate claimants adequately and quickly and return resources back into commerce where they can continue to be productive. If let stand, the ruling of the Eleventh Circuit will only delay the claims proceedings regarding oil spills and waste away the capital assets of our country's waterborne transportation fleet.

Finally, the Eleventh Circuit's decision does not suggest that claimants in this case, or in general, will suffer any prejudice as a result of the application of Rule F to OPA 90 claims. On the contrary, however, the preclusion of the use of Rule F and *concursus* will severely prejudice shipowners and operators.

ARGUMENT

I. The Ruling of the Eleventh Circuit effectively prevents vessel owners from availing themselves of the limitation of liability provisions created by Congress in OPA 90.

A. In OPA 90, Congress sustained the right of vessel owners to limit their liability for damages for claims arising from oil spills.

When Congress created OPA 90 (33 U.S.C. § 2704), its goal was not to do away with the limitation of liability theory under which maritime law has operated for over one hundred years. Instead, Congress in OPA 90 replaced the traditional formula for calculating a vessel owner's limit of liability under the Limitation Act with a new formula. That is, instead of limiting the vessel owner's

liability to the value of the vessel and its pending freight, Congress created a separate liability fund for claims arising from oil pollution in OPA 90. The new limitation was equal to $1,200 per gross registered ton, with respect to oil-carrying tank vessels. But, in doing so, Congress implicitly and explicitly ratified and reaffirmed that vessel owners and operators should have a measure of protection against the potentially crushing liabilities faced by those companies whose vessels are involved in maritime commerce and maritime casualties. Protection of the maritime industry from the uniquely enormous (and potentially uninsurable) liabilities which marine transportation companies face was a primary aim of Congress in 1851, when it passed the Limitation Act, just as it was in 1990 when it passed OPA 90. Congress had clearly in mind, in 1990, the estimated $3 billion in liability faced by Exxon Corporation as a result of the EXXON VALDEZ incident, and in OPA 90 Congress purposefully chose to limit vessel owner's liability for oil spill damages.[2] Similar to OPA 90's predecessors, the Clean Water Act ("CWA") and the Federal Water Pollution Control Act ("FWPCA"),[3] the trade-off for the owner/operator of the spilling vessel was that liability would be strict, subject only to limited defenses. But in return, the owner/operator would

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[2] The intent of Congress was quite clearly expressed in the text of the preamble of the OPA 90, which reads "An Act to establish limitations on liability for damages resulting from oil pollution . . . "

[3] 33 U.S.C. § 1251 *et seq.*

not be subject to crushing, potentially uninsurable, liability.[4]

Now, the Eleventh Circuit threatens to undo and cast aside that limitation protection with its ruling precluding *concursus*.

B. In order for vessel owners to limit their liability according to the provisions of OPA 90, there must be some procedure through which claims and assets can be marshaled for assessment and payment.

Because Congress intended vessel owners to be able to limit their liability, payment of claims under OPA 90 necessarily involves the equitable allocation of a limited fund. An equitable allocation of the fund among all claimants can only be achieved through the use of a marshaling order, producing a *concursus* of claims. If claims against a vessel owner/operator are not assembled into one controlling forum, the Courts cannot assure that the provisions of OPA 90, which allow vessel owners to limit their liability, will be given any effect. Even without conflicting decisions in different Courts, a vessel owner may be liable in each suit it defends for up to the applicable OPA 90 liability limit. Thus, without the guidance of one managing forum, through which all OPA 90 claims are adjudicated, the vessel owner/operator is left vulnerable to damages far beyond those contemplated by Congress in OPA 90. In actual fact, without the *concursus*

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[4] Under the CWA/FWPCA, liability could only be avoided if the oil spill had been caused by an act of war, an act of God, or the sole fault of a third party. 33 U.S.C. § 1321(f)(1)(A-D).

procedure of Rule F, the limits of liability set by Congress in OPA 90 are meaningless. This disregard of Congress' wishes cannot be permitted. *See Bouchard Transportation Company, Inc. v. Updegraff*, 147 F.3d 1344, 1351 (11th Cir. 1998), *citing Woodfork v. Marine Cooks & Stewards Union*, 642 F.2d 966, 970-971 (5th Cir. 1981) ("A basic principle of statutory construction is that a statute should not be construed in such a way as to render certain provisions superfluous or insignificant"). Logic alone dictates that Rule F is a necessary tool for the implementation of OPA 90.

C. *Concursus* does not prejudice claimants in any way.

It is obvious that OPA 90 includes numerous provisions to protect the right of claimants to a full recovery for damages defined in OPA 90. However, the use of Rule F in no way prejudices the rights of claimants to full recovery. Indeed, the Eleventh Circuit's opinion does not show how the District Court's use of Rule F prejudiced claimants in any fashion to support the granting of relief sought by the claimants. The Eleventh Circuit's opinion is based entirely on its statutory construction of OPA 90, which must be wrong because it has no effect on the rights of claimants to recover but voids the limitation provisions that were included to protect the interests of vessel owners.

II. The Eleventh Circuit's decision will have a severe and negative impact on the marine transportation industry.

A. Insurance costs will rise sharply

Doing away with Rule F and the *concursus* procedure will significantly affect the marine insurance industry, and the knock-on effect on insurance costs will be deeply felt by AWO members. Simply put, the *concursus* procedure allowed the marine insurance industry to predict accurately the amount of liability its assureds would face in the event of an oil spill. If the limitation of liability regime is effectively annulled by denying vessel owners the use of the *concursus* procedure, the marine insurance industry will be left without the ability to calculate accurately the risk it underwrites. More importantly, the cost of claims will skyrocket. As a result, insurance against OPA 90 claims will become expensive and difficult to purchase. Additionally, many shipowners and operators may not be able to completely protect themselves through insurance, as only the larger companies will be able to afford high levels of insurance protection.

The difficulty in obtaining insurance will have far reaching effects in the shipping industry and will affect every vessel on American waters, because the application of OPA 90 is not limited to oil tankers. Every vessel on the water that carries oil as part of its fuel supply is also subject to the statute's provisions. Additionally, OPA 90 applies to all oil spills no matter how much oil is discharged. OPA 90 also applies to third-party vessels that cause oil to be spilled from other vessels or facilities.

Therefore, every vessel that navigates upon American waters is subject to OPA 90 and its liability provisions.

Furthermore, because OPA 90 applies to all vessel owners, and is not limited to corporate owners of super tankers, the decision of the Eleventh Circuit will have a disparate impact on small fleets and vessel owners, who do not have the financial resources to obtain the required certificates of financial responsibility, which are mandated by OPA 90 for certain types of vessels. Eventually, if vessel owners and operators are denied the use of the *concursus* procedure in OPA 90, causing claims and insurance costs to rise, OPA 90 will force the smaller vessel owners out of business because they will be unable to meet the statutory requirements.

B. *Concursus* has historically benefitted both shipowners and the public.

The *concursus* procedure mandated by Rule F provides that all claimants are brought together in one proceeding in order to adjudicate the common issues of liability and amount of damages, and provides for the "prompt and economical disposition [of] controversies." *Maryland Cas. Co. v. Cushing*, 347 U.S. 409, 415 (1954). In fact, this Court has recognized the importance of the principle of *concursus* in limitation actions:

> The heart of [the limitation] system is a *concursus* of all claims to ensure prompt economical disposition of controversies in which there are often a multitude of Claimants. . . . Moreover, it is important to bear in mind that the *concursus* is not solely for the benefit of the shipowner. The

> elaborate notice provisions of the Admiralty Rules are designed to protect injured Claimants.

Id. at 415, 417. The marshaling of claims in this manner prevents the very real risk and judicial waste of numerous and inconsistent rulings. Furthermore, preventing Courts from establishing a *concursus* of claims against the vessel owner in a limitation of liability proceeding under OPA 90 goes against the grain of a long-standing tradition of admiralty jurisprudence. The practice of marshaling all claims against vessel holders in a limitation proceeding, regardless of whether particular claims are indeed subject to limitation, has historically been upheld by the Federal Courts. *See British Transport Commission v. United States*, 354 U.S. 129 (1957) (following the established policy of litigating all claims in one forum); *The James Horan*, 10 F.Supp. 363, 363-364 (D.N.J. 1935), *aff'd*, 78 F.2d 870 (3d Cir.), *cert. denied*, 296 U.S. 621 (1935) ("it is established that the admiralty court, having taken jurisdiction to limit liability and having brought all claimants into concourse, will give complete relief and determine all matters relating to the subject. . . . [I]t is the practice of the Courts of admiralty to adjudicate all the claims in concourse even after the denial of limitation of liability.") (*citing Hartford Accident & Indemnity Co. v. Southern Pacific Co.*, 273 U.S. 207 (1927) and *Spencer Kellogg & Sons v. Hicks*, 285 U.S. 502 (1932)).

The Federal Courts have a sustained history of consolidating multiple claims pending in the same district to effect the same judicial efficiency promoted by Rule F. *See, e.g., Hines, Inc. v. United States*, 551 F.2d 717, 729 (6th Cir. 1977) (ordering consolidation of both limitable and

non-limitable claims for trial); *In re Chinese Maritime Trust, Ltd.*, 478 F.2d 1357, 1361 (2d Cir. 1973), *cert. denied*, 414 U.S. 1143 (1974) (consolidating non-limitable claim with limitation action to "avoid duplicative litigation of identical issues;" requiring as a condition of allowing a non-limitable claim to go forward that the parties stipulate to its prosecution in the forum with jurisdiction over the related limitation proceeding); *In re Lloyd's Leasing, Ltd.*, 764 F. Supp. 1114, 1137 (S.D. Tex. 1990) (non-limitable Clean Water Act governmental claim consolidated with limitation action). Furthermore, without implementation of Rule F, those claims that are both limitable and non-limitable (based on general maritime law or state law) will be split between the limitation forum and the forum of the claimant's choosing. Such interspersion of claims runs completely counter to traditional prohibition against splitting causes of action among various Courts or forums. *See Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 320 (1927). Moreover, since a limitation action to marshal non-OPA 90 claims will undoubtedly be filed in most, it not all, maritime casualties, it simply makes no sense not to allow (and indeed, require) the same court to hear the non-OPA 90 and the OPA 90 claims.

III. Denying vessel owners the use of Supplemental Rule F imposes upon them an arbitrary and unfair burden with regard to the cost and hardship of litigation.

For the American shipping industry, the problems created by Eleventh Circuit's decision are numerous and far reaching. If the Eleventh Circuit's decision is allowed

to stand, all claimants involved in an oil spill casualty will be free to sue vessel owners in separate and independent actions in various jurisdictions throughout the country. Aside from being horribly inefficient, as the vessel owners would be forced to defend many actions in as many jurisdictions, this result is incompatible with the federal policy against multiple and piecemeal litigation and its potentially conflicting results. *Bienville Water Supply Co. v. Mobile*, 186 U.S. 212, 217 (1902) ("The law will not permit the splitting up into separate suits of different grounds for the same relief.").

The Eleventh Circuit sanctions the splitting of claims, which can be brought as general maritime law claims in the usual Limitation Act *concursus*, and then brought in a different court under the guise of an OPA 90 claim.[5] For example, a claimant that cleaned up oil from its real or personal property might file a claim in the limitation action brought by the vessel owner, while at the same time bringing a separate OPA 90 action in a different court for the same damages, in order to ensure full recovery. Furthermore, by denying the use of the procedural tool of Rule F and *concursus* of claims, the Eleventh Circuit encourages potential claimants to commence a race to the courthouse and a race to judgment, in an effort to reach the limited fund before it can be exhausted by the first claims to be adjudicated. Indeed, if the first court to reach a judgment held that the OPA 90 limitation

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[5] OPA 90 expressly does not pre-empt other law, including state law. 33 U.S.C. § 2702 (a) ("Notwithstanding any other provision or rule of law. . . . ").

amount should be the proper limit of the owner/operator's OPA 90 claims liability, all the other litigations should end, if the limitation amount were exhausted by the first action. Those claimants then must turn to the Oil Spill Trust Fund, administered by the U.S. Coast Guard, for payment of their claims. All the other litigations would have been wasted efforts. (But a judge that was not bound by the first decision could continue the litigation before that Court and reach a contradictory result.) So both a race to the Courthouse and a race to judgment is the inevitable result of the Eleventh Circuit's decision.

The traditional procedural safeguard of *res judicata* will not ease the burden of the Eleventh Circuit's decision because of the persistent lack of symmetry of the parties. *See Brown v. Felsen*, 442 U.S. 127, 131 (1979) (indicating that *res judicata* bars further claims only by the same parties or their privies). The absence of any supplementary procedural rules with which the Courts can protect vessel owners from years of continuous and repetitive litigation only further endorses the logic of applying the *concursus* procedure of Rule F to these claims.

The Eleventh Circuit's decision creates other practical problems for the American shipping industry. With each additional and subsequent claim filed in each individual jurisdiction, the particular vessel at issue will be subjected to an additional maritime arrest or attachment proceeding. Supplemental Rule B allows for the attachment of a vessel as a form of substituted service of process upon the vessel owner *in personam*. Without the enjoinment of other actions or proceedings through Rule F(3), an otherwise viable and productive vessel will be

taken out of commerce entirely while the numerous petitions against it are adjudicated over many years. Meanwhile, the detained vessel becomes an even greater liability to its owner as its inaction prevents payment of insurance premia and ship mortgages.

CONCLUSION

If the Eleventh Circuit's ruling is allowed to stand, it will produce direct and disastrous consequences for the American shipping industry. By denying vessel owners the right to marshal the claims filed against them into one proceeding to distribute the limitation fund equitably, the Eleventh Circuit has essentially invalidated the wish of Congress that a vessel owner's liability for damages arising from an oil spill be capped at a defined limit.

Furthermore, the Eleventh Circuit's ruling virtually sentences vessel owners to years of continuous litigation. Meanwhile, the vessels involved in the particular incidents will remain caught in never ending proceedings, remaining unproductive and unprofitable. In time, the backlog of the Courts and inevitable bankruptcy of vessel owners will gradually deplete our nation's fleet of petroleum carrying vessels. Vessel owners who remain in business will be forced to buy added liability insurance (provided, of course, that insurance for unlimited liability under OPA 90 is available and affordable) and spend enormous resources in litigation expenses. The ultimate burden of this ruling will therefore fall upon the American consumer as the cost of transporting petroleum products is increased sharply. Accordingly, the Eleventh

Circuit's decision presents grave consequences that will reach far beyond the Florida incident and the individual parties involved in this case. If upheld, the decision will drastically impact the entire marine transportation industry, and America's oil industry. For the foregoing reasons, AWO respectfully requests that the Petitioner's Writ be granted, and the Eleventh Circuit's decision be reviewed and reversed.

Respectfully submitted,

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BOUCHARD TRANSPORTATION COMPANY, INC.; TSACABA SHIPPING COMPANY, INC.; MARITRANS OPERATING PARTNERS L.P., *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY TO BRIEFS IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

1. Whether district courts exercising their admiralty and maritime jurisdiction should apply the procedure of Supplemental Rule F to implement the limitation of liability provisions of the Oil Pollution Act of 1990 (OPA 90).

2. If not, whether this Court will make the rules needed to fill the resulting procedural void as it did in a similar situation in *Norwich Co. v. Wright*, 80 U.S. (13 Wall.) 104, 125 (1871).

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REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners, BOUCHARD TRANSPORTATION CO., INC., *et al.*, submit this brief in reply to the briefs in opposition to the petition filed on behalf of:

1. The United States,[1]

2. The Florida Department of Environmental Protection ("Florida DEP"), and

3. The "Boca Ciega Claimants."

GENERAL REPLY TO ALL THREE BRIEFS IN OPPOSITION

All opponents of the petition suggest that this case is one of merely local concern with little prejudice to be suffered by petitioners if the Court denies the petition. Quite to the contrary, as shown by the briefs of *amici curiae*, the Maritime Law Association of the United States and the American Waterways Operators, the enforcement of the Congressionally mandated regime of limitation of liability under OPA 90 is of national import. Moreover, the petitioners have been sued in state court and federal court actions by the various claimants, and these actions have been held in check only by the injunctions issued by the district court under Supplemental Rule F(3). If the decision of the Eleventh Circuit Court of Appeals is

[1] The United States filed a single brief in opposition to the petitions in cases numbered 98-682 and 98-752. This brief replies to the United States' brief only in connection with the issues raised in case number 98-682.

allowed to stand, the injunctions will be lifted, and the separate lawsuits will proceed forward. Thus, vessel owners will suffer all of the prejudice set forth in the petition, and the limitation provisions of OPA 90 will be rendered meaningless.

SPECIFIC REPLY TO BRIEF IN OPPOSITION OF THE UNITED STATES[2]

The United States opens its brief with a discussion of the Limitation of Shipowner's Liability Act of 1851, United States' Brief at 2, and then asserts that "the owners of the three vessels filed petitions under the Limitation Act, 46 U.S.C. App. 183(a)." United States Brief at 4. In fact, the vessel owners commenced limitation proceedings in the district court under Supplemental Rule F. The owner of the bulk freighter (the Tsacaba interests) in its limitation complaint sought limitation under the Limitation Act of 1851. The owners of the tank barges (the Bouchard and Maritrans interests) in their limitation complaints sought limitation under the Limitation of 1851 Act as to those claims subject to limitation under that Act (such as collision damage to the vessels and their cargo), and also sought limitation under OPA 90

[2] The right to limitation under the Limitation Act of 1851 is not an issue brought to this Court. However, in the interest of accuracy, it should be noted that the Act has always been construed to apply to death and personal injury claims. *See Butler v. Boston Steamship Co.*, 130 U.S. 527, 552 (1889). *See also Just v. Chambers*, 312 U.S. 383, 386 (1941). The United States' assertion to the contrary is incorrect. *See* United States' brief at 2, 6.

as to claims subject to limitation under OPA 90 (such as cleanup costs and damages resulting from the impact of oil).

The district court then tailored the injunctions issued under Supplemental Rule F(3) against further proceedings against the owners of the tank barges to protect the owners' limitation rights under both the 1851 Limitation Act and OPA 90 and also to protect the claimants' rights to recover. *See* Petition App. 25.

The United States virtually ignores the indisputable fact that OPA 90 is a limitation of liability statute just as is the Limitation Act of 1851, only with different amounts of limitation and different bases for entitlement to limitation. The United States' only reference to vessel owners' limitation rights under OPA 90 is in a footnote in its brief. *See* United States' Brief at 7 n. 4. Moreover, in the footnote the United States suggests that limitation rights in this case are speculative due to "alleged violations of federal safety rules." The paramount issue brought to this Court is not whether the vessel owners will, after trial, be entitled to limitation. The problem faced by vessel owners is that in the absence of Supplemental Rule F, there is no procedure to seek limitation.

The United States suggests that petitioners may rely on "procedures generally available to litigants in the federal court system" such as consolidation under Fed. R. Civ. P. 42. As pointed out above, the vessel owners have been sued in state court and in federal court, and there is no procedure other than Supplemental Rule F to bring all claims into a single proceeding. *Concursus* of claims is accomplished by a combination of the injunction issued

under Supplemental Rule F(3), which prevents litigation against a vessel owner in any other proceeding, and the monition issued under Supplemental Rule F(4), which admonishes claimants to file their claims in the limitation case.

The United States shows no prejudice to be suffered by it as a result of vessel owners' use of Supplemental Rule F and does not rebut the assertion that Supplemental Rule F is required to protect vessel owners' limitation rights under OPA 90. The crux of the United States' argument is simply that the Eleventh Circuit was correct in this case and that the First Circuit was correct in *In re Metlife Corp.*, 132 F.3d 818 (1st Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S. Ct. 2367 (1998). However, both the Eleventh Circuit and the First Circuit completely ignored in their opinions vessel owners' limitation rights under OPA 90 and the requirement of a procedure to protect those rights. Regardless of the fact that the two circuit courts that have considered the issue are in accord does not make the decisions of those courts correct. Moreover, procedural rights in admiralty and maritime cases is a subject appropriate for this Court to consider as the final arbiter of admiralty and maritime law in this country, particularly when a rule of procedure is essential to giving effect to a maritime statute.

SPECIFIC REPLY TO BRIEF IN OPPOSITION OF FLORIDA DEP

Florida DEP argues that a case of statutory construction does not possess inherent importance. Florida DEP's brief at 3. The courts below have failed to give effect to a central feature of OPA 90, the primary maritime environmental protection statute of the United States. Petitioners submit that this does have inherent importance to them, to all vessel owners, to the courts, and to all citizens of this country.

Florida DEP contends that vessel owners will not be faced with liability in excess of the amount Congress intended "unless the damages obtained for all OPA 90 claims, in all lawsuits, exceeded both the vessel owners' maximum liability *and* the $1 billion reimbursement cap for the federal Oil Spill Liability Trust Fund." Florida DEP's brief at 4. Emphasis in original. Florida DEP's contention makes no sense. Excess liability is the exact consequence of the failure of the courts below to allow the use of the *concursus* procedure of Supplemental Rule F.

Florida DEP says that "[b]y writing OPA 90 the way it did, Congress favored compensation for those damaged by oil spills over the convenience of vessel owners." Florida DEP's brief at 4. "Convenience" is not an issue. The right of vessel owners to have the benefit of the limitation provisions of OPA 90 is the issue.

SPECIFIC REPLY TO BRIEF IN OPPOSITION OF THE BOCA CIEGA CLAIMANTS

The Boca Ciega Claimants say:

> The statute and the legislative history make crystal clear that OPA completely supersedes the Limitation Act of 1851. The vessel owners attempt to get around this incontrovertible fact by arguing that Supplemental Rule F to OPA [sic], a rule of civil procedure, creates an independent right to concursus.

Boca Ciega Claimants' brief at 3.

Throughout this litigation, petitioners have never taken the position that claims under OPA 90 are subject to the Limitation Act of 1851. Therefore, petitioners are not trying to get around anything. The Boca Ciega Claimants incorrectly characterize petitioners' position. Petitioners base their position on the necessity of *concursus* procedure to give effect to the limitation of liability provisions of OPA 90 and on the fact that Congress must have been aware that Supplemental Rule F would work quite nicely. The Boca Ciega Claimants and the courts below have completely ignored the obvious fact that vessel owners have limitation rights under OPA 90 that are worthy of protection but will not be protected in the absence of a procedure to bring all claimants into *concursus* either under Supplemental Rule F or some other rule to be fashioned by the Court.

The Boca Ciega Claimants say that a "Senate Report characterized the Limitation Act as a 'potentially devastating bar' to effective recovery of either cleanup costs or damages." Boca Ciega Claimants' Brief at 4. The report was concerned with the liability limits imposed by the

Limitation Act of 1851. As mentioned above, petitioners do not contend that claims under OPA 90 are subject to limitation under the Limitation Act of 1851. Supplemental Rule F, which was not considered in the Senate Report, does not in any way limit recovery to any extent. Supplemental Rule F is merely the procedural device that protects a vessel owner's right to the limited liability provisions of any limitation statute, be it the Limitation Act of 1851 or OPA 90. Without the use of Supplemental Rule F or some other such rule providing for a *concursus*, the substantive limitation provisions of OPA 90 cannot be given effect.

Interestingly, no respondent's opposition brief (and no court) has articulated any reason, policy or otherwise, why Supplemental Rule F should not be used in oil spill cases to protect the rights of all parties. No harm has been shown that would be suffered by any party as a result of the use of Supplemental Rule F. Contrary to the general assertions of the respondents, Supplemental Rule F provides the appropriate procedure to resolve claims while protecting vessel owners' limitation rights arising out of a maritime disaster.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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No. 98-682

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In The

Supreme Court of the United States

October Term, 1998

BOUCHARD TRANSPORTATION COMPANY, INC.;
TSACABA SHIPPING COMPANY, INC.;
MARITRANS OPERATING PARTNERS L.P., *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

SUPPLEMENT TO THE PETITION FOR WRIT OF CERTIORARI

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INTERESTED PARTIES

Please refer to the list of Interested Parties included in the Petition for a Writ of Certiorari at ii.

SUPPLEMENT TO THE PETITION FOR WRIT OF CERTIORARI

Petitioners, Bouchard Transportation Company, Inc., *et al.*, wish to advise the Court that agreements have been reached to compromise and settle the claims of the United States and the Florida Department of Environmental Protection in connection with environmental damage and cleanup costs arising out of the oil spills. (Copies of the settlement documents will be submitted on request.)

The settlements do not affect the Petition for a Writ of Certiorari. Numerous claimants appeared in the limitation cases in the district court and asserted claims. *See* Petition at iii for a complete list of the claimants. The settlements with the United States and the Florida Department of Environmental Protection, when concluded, will resolve the claims of only two of the claimants. There will remain the need for a *concursus* of the many other claims to give effect to the limitation provisions of the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701 *et seq.*

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